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V. 3027

No. 15503

United States
Court of Appeals
for the Ninth Circuit

ESTATE OF GRACE N. WILLIAMS, Deceased;
RALPH E. WILLIAMS, Executor,

Petitioner,

VS.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Transcript of Record

**Petition to Review a Decision of the Tax Court
of the United States**

FILED

MAY 27 1957

PAUL P. O'BRIEN, CLERK

No. 15503

United States
Court of Appeals
for the Ninth Circuit

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APPEARANCES

JOHN L. FLYNN,
U. S. Nat'l Bank Bldg.,
Portland 4, Oregon,
For the Petitioner.

CHARLES K. RICE, ESQ.,
Asst. Attorney General;

ELLIS N. SLACK,
Atty., Tax Division,
Dept. of Justice,
Washington 25, D. C.,
For the Respondent.

Tax Court of the United States

Docket No. 57441

ESTATE OF GRACE N. WILLIAMS (Deceased),
RALPH E. WILLIAMS, Executor,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

10/1/56, assigned to Judge LeMire, recalled to duty.

DOCKET ENTRIES

1955

Apr. 18—Petition received and filed. Taxpayer notified. Fee paid.

Apr. 19—Copy of Petition served on General Counsel.

Apr. 18—Request for Circuit hearing in Portland, Oregon, filed by taxpayer. 4/21/55, granted.

June 2—Answer filed by General Counsel.

June 8—Copy of Answer served on taxpayer, Portland.

1956

Feb. 17—Hearing set April 30, 1956, Portland, Oregon.

May 4—Hearing had before Judge LeMire on the merits. Stipulation of Facts filed at hearing. Petitioner's Brief, 6/18/56; Respondent's Brief, 7/18/56; Petitioner's Reply Brief, 8/7/56.

1956

May 29—Transcript of Hearing 4/30/56, 5/4/56, filed.

June 15—Motion for extension of 15 days to file Brief filed by Petitioner. 6/18/56, granted.

July 5—Brief filed by Petitioner. 7/5/56, served.

Aug. 2—Brief filed by Respondent. Copy served 8/3/56.

Aug. 16—Petitioner's Brief in Reply filed. 8/17/56, served.

Oct. 29—Memorandum Findings of Fact and Opinion filed. LeMire, J. Decision will be entered under Rule 50. Served 10/29/56.

Dec. 11—Agreed computation filed.

Dec. 12—Decision entered, Judge LeMire. Served 12/13/56.

1957

Mar. 7—Bond in the amount of \$21,500.00 approved and ordered filed.

Mar. 7—Petition for review with Affidavit of Service of Notice of Filing Petition for Review and Designation filed, by Petitioner. (Ninth Circuit.)

Mar. 7—Designation of Contents of Record on Review filed by Petitioner.

Mar. 14—Designation of Additional Portions of Record on Review filed by General Counsel. Statement of Service thereon.

The Tax Court of the United States

Docket No. 57441

ESTATE OF GRACE N. WILLIAMS (Deceased),
RALPH E. WILLIAMS, Executor,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (Symbol A:R:90D:ENH) dated February 3, 1955, and as a basis of its proceeding alleges as follows:

1. The petitioner is the duly qualified and acting executor of the Estate of Grace N. Williams, deceased August 20, 1954, under letters testamentary issued by the Circuit Court of the State of Oregon for the County of Multnomah, Department of Probate, on September 29, 1954; a certified copy of the said letters testamentary is attached to this petition as Exhibit "A." The address of the petitioner herein, Ralph E. Williams, Executor of the Estate of Grace N. Williams (deceased), is at 1985 Southwest Sixth Avenue, in the City of Portland, State of Oregon.

2. The notice of deficiency dated February 3, 1955 (a copy of which is attached to this petition and marked Exhibit B), was mailed to the petitioner on or after February 3, 1955.

3. The deficiencies and over-assessments as determined by the Commissioner are in income taxes for the calendar years 1950, 1951, 1952, and 1953, in the net amount of \$15,118.48, and are more specifically set out below:

Calendar year 1950, over-assessment	\$ (21.30)
Calendar year 1951, deficiency	2,806.69
Calendar year 1952, deficiency	13,060.19
Calendar year 1953, over-assessment	(727.10)

The deficiencies and the over-assessments of income taxes in controversy are listed below:

Calendar year 1951, deficiency	\$ 2,806.69
Calendar year 1952, deficiency	13,060.19
Calendar year 1953, over-assessment	(727.10)

4. The determination of income tax deficiencies and over-assessments set forth in said notice of deficiency are based upon the following errors:

(a) The determination that the short term capital loss in the amount of \$1,370.90 sustained on a debt due from Ben Hilton, a former partner of the petitioner, was not allowable as a deduction from income of the year 1951 as claimed by the petitioner, or in the alternative that such loss represented a loss sustained by the petitioner by reason

of petitioner's being unable to collect or to realize the cost basis of assets distributed to her in liquidation of a partnership.

(b) The determination that the fair market value of a growing crop received by the petitioner upon distribution in liquidation of Eola Hop Farms, a corporation, during the year 1952, was \$4,375.40 and not \$45,412.97 as claimed by the petitioner.

(c) The determination that the fair market value of buildings and equipment received by the petitioner upon distribution in liquidation of the assets of Eola Hop Farms, a corporation, during the year 1952, was \$18,937.04 instead of \$25,870.92 as claimed by the petitioner.

(d) The failure of the Commissioner to recognize that the petitioner's cost basis for the determination of gain or loss on liquidation during the year 1952 of the petitioner's investment in the capital stock of Eola Hop Farms, a corporation, was \$71,978.60 and the determination by him that the cost basis of the petitioner's investment was \$65,-978.60 for the purpose of such determination.

(e) The determination that the petitioner sustained a long-term capital loss upon liquidation of the Eola Hop Farms during the year 1952 in the amount of \$51,429.05.

(f) The determination that depreciation claimed by the taxpayer as sustained in the growing of hops for sale as a sole proprietorship during the period

from August 1 to December 31, 1952, was excessive in the amount of \$2,348.33.

(g) The determination that the petitioner did not sustain a loss in the amount of \$43,385.90 from the growing, harvesting, and sale of hops as a proprietorship during the year 1952, as claimed by the petitioner.

(h) The failure of the Commissioner to allow to the petitioner a deduction from income of the year 1951 of that portion of an operating loss sustained from the growing, harvesting, and sale of hops during 1952, not offset by the petitioner's income from other sources during the year 1952.

(i) The determination that the petitioner was not entitled to the deduction from income of the year 1953 for the depreciated value of physical properties scrapped during the year 1953, and that the said physical properties were without value except for scrap at July 31, 1952.

(j) The failure of the Commissioner to allow the petitioner a capital loss carry-over for the year 1953 represented by that portion of the adjusted cost basis of the petitioner's investment in the capital stock of Eola Farms, a corporation, not recovered upon liquidation of the corporation and not previously deducted from income.

5. The facts upon which the petitioner relies as the basis for this proceeding are as follows; they are based upon the information and belief of petitioner.

(a) The petitioner filed timely federal income tax returns for the years 1950, 1951, 1952, and 1953 with the Director of Internal Revenue, Portland, Oregon, reporting net income thereon in the amounts listed below:

1950	\$36,241.51
1951	30,344.40
1952 Loss	(8,731.03)
1953	9,094.27

(b) The petitioner filed a tentative carry-back adjustment of an operating loss from the calendar year 1952 to the calendar year 1951 and received refund of federal income taxes paid in the amount of \$2,121.24, which sum is included with the Commissioner's determination of deficiency for the calendar year 1951.

(c) That during the year 1948, the petitioner was a co-partner with Harry L. Hart and Ben Hilton engaged in the business of growing, harvesting, and raising hops under the name of Williams, Hart, and Hilton in Josephine County, Oregon; that during June, 1948, the said partnership was dissolved and distribution of the assets of the partnership was made to the partners thereof, including petitioner.

(d) That the petitioner received a distribution of assets in dissolution of the Williams, Hart & Hilton partnership valued at \$52,820.43; that the said distribution included a 50% interest in an account receivable in the amount of \$5,000.00 due the

partnership from Ben Hilton for withdrawals of partnership funds; that the cost basis to the petitioner of the assets received by the said petitioner from the said partnership was \$48,408.18; that the petitioner paid additional federal income taxes for the calendar year 1948 upon the sum of \$4,412.25 based upon an audit and assessment made by an agent of the Bureau of Internal Revenue; that said sum of \$4,412.25 represented the gain realized by the petitioner upon distribution of a proportionate share of the assets of the Williams, Hart & Hilton partnership to the petitioner, based upon a valuation of the said distribution to the taxpayer at \$52,820.43.

(e) That the petitioner agreed to and did accept a 50% interest in the account receivable in the amount of \$5,000.00, due from Ben Hilton to the partnership, hereinbefore referred to, upon dissolution of the partnership and distribution of the partnership assets; that no part of said account has been received by the petitioner except the sum of \$1,129.10 paid during 1949; that there is unpaid and due petitioner from Ben Hilton, the sum of \$1,370.90; which sum has not been collected or realized by the petitioner.

(f) That Eola Farms, Inc., a corporation, was organized under the laws of the State of Oregon, March 1, 1951; that at all times material herein the said corporation was duly authorized and licensed to engage in the business of growing, harvesting, and marketing hops in the County of Marion, State

of Oregon; that the sole assets of the corporation at March 1, 1951, consisted of a farm containing 185 acres, more or less, together with buildings and equipment necessary to enable the corporation to carry on the business of hop farming, marketing, and sales; that all of the assets owned by the corporation at the commencement of business March 1, 1951, were acquired by transfer from the petitioner in exchange for capital stock of the corporation; that the petitioner was at all times material herein the owner of all of the issued and outstanding shares of capital stock of the said corporation.

(g) That the petitioner's investment in shares of the capital stock of Eola Farms, Inc., was represented by properties turned over to the corporation by the petitioner; that the cost basis of the said properties to the petitioner for the purpose of the determination of gain or loss upon sale or realization was \$71,978.60; that the petitioner's cost basis was made up of the following sums:

Loans to Williams and Thacker partnership, by Grace N. Wil- liams	\$54,533.50
Purchase price of interest of L. H. Thacker, Williams and Thacker partnership	24,000.00
Capital account, Grace N. Williams	(6,554.90)
	<u>\$71,978.60</u>

(h) That, the entire assets of Eola Farms, Inc., were distributed to the petitioner during July, 1952,

in complete liquidation and redemption of the capital stock of said corporation in accordance with the laws of the State of Oregon governing the dissolution of Oregon corporations; that the records of the corporation reflected the value of the capital and surplus of the corporation at \$57,653.26 as set out on the balance sheet of Eola Farms, Inc., Exhibit C attached to this petition and incorporated herein by reference.

(i) That the fair market value of the assets received by the petitioner upon liquidation of Eola Farms, Inc., and the redemption by that corporation of the shares of capital stock of Eola Farms, Inc., owned by the petitioner was not less than \$126,968.36 on the date that the said assets were distributed to the petitioner; that the petitioner assumed obligations of the said Eola Farms, Inc., aggregating \$54,989.62 upon dissolution of the said corporation; that the said obligations were paid by the petitioner; that the fair market value of the equity received by the petitioner in properties distributed by Eola Farms, Inc., to the petitioner was not less than \$71,978.60 at the time the said distribution was made.

(j) That the properties distributed to the petitioner during July, 1952, in exchange for shares of the capital stock of Eola Farms, Inc., owned by the petitioner included 149.5 acres of land planted exclusively to hops; that the crop of hop vines growing on the said land was not fully formed or matured at the date of distribution of the properties

to the petitioner, and; that the said crop of hops was not at the date of the said distribution or subsequently thereto subject to any contract or agreement of sale upon maturity and harvest.

(k) That the expected life and depreciation claimed by the petitioner for properties used in the production and harvest of hops during the years 1952 and 1953 was reasonable.

(l) That the petitioner did abandon the growing of hops on land received in liquidation of Eola Farms, Inc., during the year 1953; that the petitioner did pull down all trellises and uproot the hop vines during that year; that the petitioner scrapped, sold, or retired all equipment and properties related to the growing of hops during the year 1953.

Wherefore, the petitioner prays that this court may hear the proceeding and determine:

(a) That the petitioner sustained a loss upon a debt in the amount of \$1,370.90 during the year 1951, or in the alternative that said loss represented a loss upon realization of the petitioner's investment in the partnership of Williams, Hart, and Hilton.

(b) That the petitioner's cost basis for the determination of gain or loss upon petitioner's investment in Eola Farms, Inc., was not less than \$71,978.60.

(c) That the fair market value of properties received in liquidation of the petitioner's investment

in shares of capital stock of the Eola Farms, Inc., was not less than \$71,978.60.

(d) That depreciation claimed by the petitioner upon properties used in the operation of a farm and the growing and harvesting of hops during the years 1952 and 1953 was reasonable.

(e) That the petitioner sustained a loss upon the scrapping and retiring of properties and equipment used in the growing and harvesting of hops and that the said loss was deductible from the petitioner's income of the calendar year 1953.

(f) That there is no deficiency of income taxes due from petitioner for the calendar years 1951 and 1952.

(g) That there is due the petitioner refunds of federal income taxes for the calendar years 1951 and 1953, and that this court establish the amount of the said refunds.

/s/ JOHN L. FLYNN,

/s/ BURTON L. COAN.

EXHIBIT A

Letters Testamentary
Department of Probate

No. 73046

State of Oregon,
County of Multnomah—ss.

To All Persons to Whom These Presents Shall
Come, Greeting:

Know Ye, That the Will of Grace N. Williams, deceased, has been duly proven in the Circuit Court for the County aforesaid, and that Ralph E. Williams who is named Executor therein, has been duly appointed such Executor by the Court aforesaid; this, therefore, authorizes the said Ralph E. Williams to administer the estate of the said deceased, according to law.

In Testimony Whereof, I, Si Cohn, County Clerk and Ex-Officio Clerk of the Circuit Court, have hereunto subscribed my name and affixed the seal of said Court, this 29th day of September, A.D. 1954.

[Seal] SI COHN,
County Clerk and Ex-Officio
Clerk of the Circuit Court.

By H. W. NEWTON,
Deputy.

Certificate

State of Oregon,

County of Multnomah—ss.

I, Si Cohn, County Clerk, Ex-Officio Recorder of Conveyances and Ex-Officio Clerk of the Circuit Court of the State of Oregon, for the County of Multnomah, which Court has exclusive jurisdiction of all probate proceedings in said County, do hereby certify that the foregoing copy of Letters Testamentary has been compared by me with the original, and that it is a correct transcript therefrom, and of the whole of such original, as the same appears of record in my office and in my custody.

I further certify that said Letters are now in full force and effect.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, this 3rd day of January, A.D. 1955.

[Seal]

SI COHN,
County Clerk,

By /s/ E. HOOPER,
Deputy.

The Law Requires That:

Note—Inventory and Appraisement must be filed within thirty days. Semi-Annual Report between the first and tenth of April and October. Final Report as soon as it is possible to close estate.

EXHIBIT B

A.R. 90D:ENH

Statement

Estate of Grace N. Williams, Deceased
 Mr. Ralph E. Williams, Executor
 1985 Southwest Sixth
 Portland, Oregon

Income tax liability for the taxable years ended December 31, 1950; December 31, 1951; December 31, 1952, and December 31, 1953.

Year	Deficiency	Overassessment
1950.....		\$ 21.30
1951.....	\$ 2,806.69	
1952.....	13,060.19	
1953.....		727.10
	<hr/>	<hr/>
	\$15,866.88	\$748.40

The determination of your income tax liability has been made on the basis of information on file in this office.

Taxable Year Ended December 31, 1950

Adjustments to Income

Net income as disclosed by return....	\$35,093.94
Unallowable deductions and additional income:	
(a) Dividends	826.29
(b) Capital gain	340.34
	<hr/>
Total	\$36,260.57
Nontaxable income and additional deductions:	
(c) Farm income	1,150.00
	<hr/>
Net income as adjusted	\$35,110.57

Explanation of Adjustments

- (a) It has been determined that you had dividend income as follows:

Dividends from Incorporated Investors per books.....	\$ 2,431.29
Dividends per return	1,507.50

Increase	923.79
----------------	--------

Less dividends from Century Shares, which are capital gains (see adjustments in capital gain under (b)).....	97.50
---	-------

Taxable income is increased accordingly by	\$ 826.29
--	-----------

- (b) Capital Gain adjustment is determined as follows:

Mountain State Power Sale \$15,337.50. Cost \$17,250.00 and Exp. \$161.82.....	(\$ 2,074.32)
--	---------------

Incorporated Investors Sale price (no basis)	1,507.50
--	----------

Century Shares Sale price (no basis)	97.50
--	-------

Cletrac Tractor Sale price (see “(e)” below)	800.00
--	--------

G. M. C. Truck & Trailer Sale price (see “(c)” below).....	350.00
--	--------

Total net long term capital gain..	\$ 680.68
------------------------------------	-----------

Portion taken into account— 50% thereof	\$ 340.34
--	-----------

Your taxable income has been increased accordingly.

- (c) Sale of Cletrac Tractor and G.M.C. Truck for \$1,150.00 is considered in capital Gains in “b” above and hence your taxable income is reduced in this amount.

Computation of Tax—Alternative Method

Net income as adjusted.....		\$35,110.57
Less: Exemption—1 x \$600.00.....		600.00
		<hr/>
Income subject to tax.....		\$34,510.57
Less: Excess of net long-term capital gain over short-term loss.....		340.34
		<hr/>
Balance subject to surtax and nor- mal tax		\$34,170.23
Tentative tax	\$15,870.65	
Tax reduction:		
\$ 400.00 at 13%.....	\$ 52.00	
15,470.65 at 9%.....	1,392.36	1,444.36
		<hr/>
Combined partial normal tax and surtax	\$14,426.29	
Add: 50% of capital gain deducted above	170.17	
		<hr/>
Total income tax liability.....	\$14,596.46	
Income tax liability disclosed by return	14,617.76	
		<hr/>
Overassessment of income tax.....	\$ 21.30	

Taxable Year Ended December 31, 1951

Adjustments to Income

Net income as disclosed by return.....	\$26,932.74
Unallowable deductions and addi- tional income:	
(a) Capital gain	1,370.90
	<hr/>
Net income as adjusted.....	\$28,303.64

Explanation of Adjustments

- (a) It has been determined that the short-term capital loss on bad debt of Ben Hilton, claimed in the return in an amount of \$1,370.90 is unallowable under the provisions of section 23 (k)(4) of the Internal Revenue Code and your taxable income has been increased in this amount.

Computation of Tax—Alternative Method

Net income as adjusted	\$28,303.64
Less: exemption—2 x \$600.00.....	1,200.00
<hr/>	
Income subject to tax	\$27,103.64
Less: Excess of long-term gain over net short-term loss	2,721.10
<hr/>	
Balance subject to surtax and nor- mal tax	\$24,382.54
Tentative tax	\$ 9,965.53
Add: 50% of capital gain deducted above	1,360.55
<hr/>	
Total income tax liability.....	\$11,326.08
Income tax liability dis- closed by return.....	\$10,640.63
Less refunded on carry- back adjustment	2,121.24
<hr/>	
Deficiency of income tax	\$ 2,806.69

Taxable Year Ended December 31, 1952

Adjustments to Income

Net income as disclosed by return (loss)	(\$11,183.69)
Unallowable deductions and addi- tional income:	
(a) Farm loss, unallowable.....	43,385.90
<hr/>	
Total	\$32,202.21
Nontaxable income and additional deductions:	
(b) Capital gain	3,413.87
<hr/>	
Net income as adjusted	\$28,788.34

Explanation of Adjustments

(a) It has been determined that the following adjustments are required in the farm income as reported:

Prepaid expense from corporation	\$44,165.66
Less: Fair value of growing crop of hops at 7/31/52.....	4,375.40
	<hr/>
Balance unallowable deferred expenses from corporation.....	\$39,790.26
Excessive depreciation on farm property (claimed \$6,671.00—allowable \$3,075.36)	3,595.64
	<hr/>
Total unallowable farm deductions	\$43,385.90

Your taxable income is increased accordingly.

(b) It has been determined that the following adjustments are required in the capital gain as reported:

Adjusted basis of capital stock under section 113(b) I.R.C. of the Eola Hop Farms, Inc., liquidated July 31, 1952.....	\$65,978.60
--	-------------

Corporate assets received:

Accounts receivable \$	441.63
Land	40,957.36
Buildings and equipment	18,937.04
Value of growing crops at 7/31/52..	4,375.40*
	<hr/>
	\$64,711.43

Less corporation liabilities assumed:

Note payable to Ralph Williams....	\$10,000.00
Account payable, State Tax Commission	27.13

Advance by Grace Williams	44,962.49	54,989.62	9,721.81
			<hr/>
Loss on liquidation..			\$56,256.79
Capital gain per re- return			4,827.74
			<hr/>
Corrected long-term capital loss			\$51,429.05
Capital loss deduction— limitation	(\$ 1,000.00)		
Capital gain reported in re- turn (50% of \$4,827.74).....		2,413.87	
		<hr/>	
Decrease to capital gain re- ported in return.....	\$ 3,413.87		
*Value of growing crops com- puted as follows:			
Gross receipts from sale of hops per return			\$49,466.65
Less: Expenses incurred by pro- prietorship in growing, har- vesting and selling the hops....	\$42,015.89		
Depreciation allowable 8/1 to 12/31/52		3,075.36	45,091.25
		<hr/>	<hr/>
Fair market value of hops on 7/31/52			\$ 4,375.40
Your taxable income has been reduced \$3,413.87 in the capital- gain reported.			

Computation of Tax

Net income as corrected.....		\$28,788.34
Less: Exemption—2 x \$600.00.....		1,200.00
		<hr/>
Income subject to tax.....		\$27,588.34
Income tax liability	\$13,060.19	
Income tax liability disclosed by re- turn		—0—
		<hr/>
Deficiency of income tax.....	\$13,060.19	

Taxable Year Ended December 31, 1953

Adjustments to Income

Net income as disclosed by return.....	\$ 7,846.61
Unallowable deductions and additional income:	
(a) Farm loss, adjustment.....	4,987.13
Total	<u>\$12,833.74</u>
Nontaxable income and additional deductions:	
(b) Capital gain	<u>7,382.77</u>
Net income as adjusted	\$ 5,450.97

Explanation of Adjustments

(a) It has been determined that the following adjustments are required in the farm income reported:

Claimed deduction for assets alleged to have been scrapped at	\$ 5,682.17
Less depreciated value of assets (sold for \$664.02)	<u>664.02</u>
Farm loss is accordingly decreased	\$ 5,018.15
Less additional allowable depreciation on farm equipment.....	<u>31.02</u>
Balance of unallowable loss.....	\$ 4,987.13

Your farm loss is reduced by \$4,987.13 and your taxable income increased in like amount.

(b) It has been determined that your capital gain adjustments are as follows:

Capital loss carry-over from 1952	\$50,429.05
---	-------------

Capital gain as computed in return at 100%.....	12,765.54
---	-----------

Corrected net capital loss.....	\$37,663.51
---------------------------------	-------------

Capital loss deduction— limitation	(\$1,000.00)
---	--------------

Capital gain reported in return (50% of \$12,765.54)	6,382.77
---	----------

Decrease in capital gains as reported	\$ 7,382.77
--	-------------

Your taxable income is reduced \$7,382.77 in accordance therewith.

Computation of Tax

Net income as adjusted.....	\$ 5,450.97
Less: Exemption—2 x \$600.00.....	1,200.00

Income subject to tax.....	\$ 4,250.97
----------------------------	-------------

Income tax liability.....	\$ 1,008.78
---------------------------	-------------

Income tax liability disclosed by return	1,735.88
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Overassessment of income tax.....	\$ 727.10
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EXHIBIT C

Eola Hop Farms, Incorporated
1985 Southwest Sixth Avenue, Portland, Oregon
Balance Sheet at July 31, 1952

Assets			
Accounts receivable....		\$	441.63
Property:			
	Cost	Reserve for Depreciation	Book Value
Farm buildings	\$21,961.40	\$17,981.87	\$ 3,979.53
Farm equipment	3,431.23	2,358.78	1,072.45
Trellis and irrigation equipment	8,705.20	4,862.68	3,842.52
Trucks, tractors, and attachments	30,489.08	13,512.66	16,976.42
	<u>\$64,586.91</u>	<u>\$38,715.99</u>	<u>\$25,870.92</u>
			25,870.92
Land			40,957.36
Prepaid expenses; (cost of raising, fertilizing, spraying growing crop to July, 1954)			45,412.97
Total assets....			<u><u>\$112,682.88</u></u>
Liabilities and Capital			
Bank overdraft		\$	250.00
State excise tax payable			27.13
Accounts payable			44,712.49
Notes payable			10,000.00
Total liabilities			<u>\$ 54,989.62</u>
Capital:			
Common stock		\$65,978.60	
Deficit		(8,285.34)	57,693.26
Total liabilities and capital			<u><u>\$112,682.88</u></u>

fully verified.

Received and Filed April 18, 1955, T.C.U.S.

Served April 19, 1955.

[Title of Tax Court and Cause.]

ANSWER

Comes Now the Commissioner of Internal Revenue, by his attorney, John Potts Barnes, Chief Counsel, Internal Revenue Service, and for answer to the petition filed herein, admits, denies and alleges as follows:

1. Admits the allegations contained in paragraph 1 of the petition.
2. Alleges that the notice of deficiency dated February 3, 1955 (a copy of a portion of which is attached to the petition and marked Exhibit B), was mailed to the petitioner on February 3, 1955, and as thus qualified admits the allegations contained in paragraph 2 of the petition.
3. Denies the allegations contained in paragraph 3 of the petition. Alleges that the deficiencies as determined by the Commissioner are in income tax for the taxable years 1951 and 1952, in the amounts of \$2,806.69 and \$13,060.19, respectively, all of which are in dispute. Specifically denies that there is in controversy, in this proceeding, any amount, whatsoever, of income tax or penalty for the taxable year 1953.
4. Denies that he erred in his determination of the deficiencies in income tax as shown in the notice of deficiency from which the petitioner's appeal is taken. Specifically denies that he erred in the manner and form as alleged in paragraph 4(a) to (j), inclusive, of the petition.

5(a). Denies the allegations contained in paragraph 5(a) of the petition. Alleges that Federal income tax returns for the years 1950 to 1953, inclusive, in the name of Grace N. Williams were filed with the Director of Internal Revenue for the District of Oregon. Specifically denies that the net income reported thereon was in the amounts shown in paragraph 5(a) of the petition.

(b) Admits the allegations contained in paragraph 5(b) of the petition.

(c) Admits that the partnership of Williams, Hart and Hilton was dissolved and distribution of the assets of the partnership made to the partners thereof during the calendar year 1948. For lack of sufficient knowledge or information upon the basis of which to form a belief as to the truth or falsity thereof, denies the remaining allegations contained in paragraph 5(c) of the petition.

(d) and (e) For lack of sufficient knowledge or information upon the basis of which to form a belief as to the truth or falsity thereof, denies the allegations contained in paragraphs 5(d) and (e) of the petition.

(f) Denies that the sole assets of the Eola Farms, Inc., a corporation, on March 1, 1951, consisted of those described in paragraph 5(f). As thus qualified admits the remaining allegations contained in paragraph 5(f) of the petition.

(g) Denies the allegations contained in paragraph 5(g) of the petition.

(h) Admits that the entire assets of Eola Farms, Inc., were distributed to the petitioner in 1952 in complete liquidation and redemption of the capital stock of said corporation in accordance with the laws of State of Oregon governing the dissolution of Oregon corporations. Denies the remaining allegations contained in paragraph 5(h) of the petition.

(i) to (k), inclusive. Denies the allegations contained in paragraphs 5(i) to (k), inclusive, of the petition.

(l) For lack of sufficient knowledge or information upon the basis of which to form a belief as to the truth or falsity thereof, denies the allegations contained in paragraph 5(l) of the petition.

Wherefore, it is prayed that the petitioner's appeal be denied and that the Commissioner's determination of the deficiencies be approved.

/s/ JOHN POTTS BARNES,
Chief Counsel,
Internal Revenue Service.

Of Counsel:

THOMAS M. MATHER,
Acting Regional Counsel;
WENDALL M. BASYE,
Attorney,
Internal Revenue Service.

Filed June 2, 1955, T.C.U.S.

[Title of Tax Court and Cause.]

STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the parties hereto, by their respective attorneys of record, that the following facts are true and that the same may be so considered and accepted by the Court as offered in evidence by the parties at these proceedings; provided, however, that the stipulations shall be without prejudice to the rights of either of the said parties to introduce other and further evidence not inconsistent with the facts herein stipulated and the admissions to follow:

1. Petitioner withdraws the assignment of error contained in paragraph 4(a) of the petition, relating to an alleged "capital loss" item of \$1,370.90.

2. Petitioner's adjusted cost basis of the capital stock of Eola Hop Farms, Inc., referred to in the assignment of error contained in paragraph 4(d) of the petition is \$64,997.11.

3. The substance of the remaining assignments of error contained in paragraphs 4(b), (c), (e), (f), (g), (h), (i) and (j) of the petition, may be stated in two issues framed as follows:

(a) What was the fair market value of certain buildings, machinery and equipment on July 31, 1952, on which date the decedent acquired the same, among other assets, in exchange for capital stock of Eola Hop Farms, Inc., as a liquidating distribu-

tion and (b) what was the fair market value of a certain growing hop crop on July 31, 1952, on which date the decedent acquired the same, among other assets, in exchange for capital stock of Eola Hop Farms, Inc., as a liquidating distribution?

4. The fair market value of buildings, machinery and equipment, referred to in the next preceding paragraph on July 31, 1952, was \$23,496.65.

5. Effect may be given under Rule 50 to the agreements and stipulations of the parties as set forth in paragraphs 1, 2, 3 and 4, above.

6. The question as to the fair market value of the growing hop crop on July 31, 1952 is the only issue remaining for decision by this Court upon the basis of the following agreed facts and other evidence to be adduced by the parties:

The growing hop crop here in question was planted on the Eola Hop Farms, Inc., located in the County of Marion, State of Oregon. This farm consisted of a total of approximately 165 acres of which 149.5 acres were planted to hops.

Prior to 1950, the farm had been operated by the petitioner and a co-partner, under the partnership of Williams and Thacker. In 1950, the interest of the co-partner was purchased by the petitioner and thereafter, until March 1, 1950, petitioner operated the business as a sole proprietorship. On March 1, 1951, all the assets and liabilities of the sole proprietorship were transferred by petitioner to Eola

Hop Farms, Inc., a corporation, in exchange for all of the capital stock of the corporation. From March 1, 1951 to July 31, 1952, the farming business was carried on by the corporation. Thereafter, farming operations were again carried on by petitioner as a sole proprietorship. In 1953, the hop vines were pulled up and the growing of hops abandoned.

The Eola Hop Farms, Inc., Corporation reported a loss of \$8,597.33 for its operations for the period from March 1, 1951 to December 31, 1951. For the seven months ending July 31, 1952, a loss was reported by the corporation in the amount of \$339.12, however, in the computation of such loss the expenses incurred by the corporation in planting hops in March and caring for the 1952 crop up to July 31, 1952, were not deducted but were carried on the balance sheet of the corporation as an asset in the amount of \$44,165.66. This sum was carried over and utilized by the petitioner in computing the loss attributable to the 1952 hop crop. In addition to the above-referred-to expenses incurred by the corporation, the petitioner, operating as a sole proprietor, after July 31, 1952, incurred further harvesting and marketing expenses attributable to the hop crop in the amount of \$42,015.89.

The receipts from the sale of hops for the years 1950, 1951 and 1952, and the expenses incurred attributable to such receipts are as follows:

Reported	1950	1951	1952
Hop receipts	\$108,246.42	\$88,506.31	\$46,445.72
Expenses	85,820.81	82,826.96	86,181.55

The total crop production for 1952, in terms of pounds, the salable quantity of the crop, the amounts sold, and the unit price per pound received and the total receipts for the 1952 hops are shown by a statement of account, dated December 31, 1952, attached hereto, marked Exhibit 1-A and by this reference made a part hereof. No contracts for the sale of the 1952 hop crop to dealers or users or any other persons had been executed by either the corporation or the petitioner of July 31, 1952.

The net income reported by petitioner for the year 1950 was \$36,241.51; for the year 1951, \$30,344.40. In her Federal income tax return for 1952 petitioner reported a net farm loss on the operation of the Eola Farms in the amount of \$43,385.90. When this loss was offset against other income received by the petitioner in 1952 the result, as reported on her tax return, was a net loss of \$8,731.03.

/s/ JOHN L. FLYNN,

Attorney for Petitioner.

/s/ JOHN POTTS BARNES,

Chief Counsel, Internal Revenue Service, Counsel
for Respondent.

EXHIBIT 1-A

Williams & Hart Hops

P. O. Box 546

Salem, Oregon

December 31, 1952.

Statement in Account With

Eola Hop Farm

1952 Crop Hops

Total crop—Per Hop Control Board.....152,740 Pounds

Salable percentage65.7%

Salable allotment100,350 Pounds

Sales	Bales	Pounds	Price	Amount
Jos. Schlitz Brewing Co.....	246	48,716	52¢	\$25,332.32
Hans Hinrichs Hops Co., Inc. 32		7,643	67¢	5,120.81
Paul Reinemann Co.....	1	228	42¢	95.76
Paul Reinemann Co.....	13	2,399	42¢	1,007.58
Yakima Chief Ranches Inc...	226	45,697	34¢	15,536.98
	518	104,683		\$47,093.45
Certificate purchase		2,399	27¢	647.73
	518	102,284		\$46,445.72
Payment—Dec. 31, 1952.....				5,000.00
Balance				\$41,445.72

Filed at hearing, May 4, 1956, T.C.U.S.

In the Tax Court of the United States

Docket No. 57441

ESTATE OF GRACE N. WILLIAMS, Deceased,
et al.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Monday, April 30, 1956

The above-entitled matter came on for hearing,
pursuant to notice to the parties, at 10:36 o'clock
a.m.

Before: Honorable Clarence P. LeMire, J.,
Presiding.

Appearances:

JOHN L. FLYNN,

For the Petitioner.

ALONZO W. WATSON, JR.,

Bureau of Internal Revenue,
For the Respondent.

PROCEEDINGS

The Clerk: Docket 57441, Estate of Grace N. Williams, Deceased.

Mr. Watson: Alonzo W. Watson, Jr., for the Respondent.

Mr. Flynn: John Flynn, for the Petitioner.

The Court: Is this case for trial, gentlemen?

Mr. Watson: The case is for trial, yes, your Honor.

The Court: How much time do you estimate for this case?

Mr. Flynn: We estimate a day, your Honor, possibly a little less.

The Court: One day. Any particular preference as to time?

Mr. Flynn: Yes, your Honor, we also would like to have it some time after Thursday for I need——
(interrupted)

The Court: Well, you realize the Court can't put them all after Thursday. I will just have to do the best I can. Do you have out of town witnesses?

Mr. Flynn: Yes.

The Court: I beg your pardon?

Mr. Flynn: Yes, I do. They do not have to come from a great distance, however, your Honor—approximately less than a hundred miles.

The Court: Very well. I will do the best I can, gentlemen. [3*]

(Whereupon, at 10:38 o'clock a.m., the calendar call in this matter was concluded. The matter was subsequently set for hearing on Friday, May 4, 1956, and at 2:45 o'clock p.m., the hearing was called, with the same parties heretofore mentioned being present.)

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

The Clerk: I will call now, Docket 57441, Estate of Grace N. Williams, Deceased. Will counsel please state your appearances?

Mr. Flynn: John Flynn, for the Petitioner.

Mr. Watson: Alonzo W. Watson, Jr., for the Respondent.

The Court: Very well, Mr. Flynn. I will be glad to have your statement.

Mr. Flynn: Most of the facts, in fact, all of the facts in this case have been stipulated between counsel, your Honor, leaving one issue of fact to be determined—that issue involves the valuation of a growing crop of hops on July 31st, 1952, which crop was received in liquidation of a corporation owned entirely by the Deceased, the capital stock of which was owned entirely by the Deceased.

It is the contention of the Petitioner that the value of that crop was less—was worth not less than the cost incurred to that date, or, in the alternative, that the fair market value was somewhat in excess of the four thousand dollars for which the Respondent contends. Petitioner expended some forty—four or five thousand dollars in cultivating the crop up to the date of liquidation of the corporation.

That is the sole issue we make. [4]

The Court: Very well.

Mr. Watson: Respondent agrees that the only issue remaining to be tried by the Court is the fair market value of a growing crop of hops, as of the date of July 31st, 1952. This particular hop crop was transferred in the middle of the growing season from the Eola Hop Farm Corporation to its sole

stockholder, the Decedent in this case. At the time that this transfer occurred, the Corporation had incurred considerable costs in planting and cultivating the crop. After the transfer, considerable additional expenses were incurred, and in 1952, most of the crop was marketed and a sizable loss was incurred as a result of the marketing. This loss was used by the Petitioner as an offset against other income.

Now, it is Respondent's position that the fair market value of this crop as of July the 31st, 1952, was in the sum of not less—or not more than four thousand three hundred and seventy-five dollars and forty cents. The evidence will show that as of July 31st, 1952, there was a serious marketing situation in the crop industry. There was considerable overproduction. The prices—the market price for hops was falling. The United States, in conjunction with the members of the hop industry, had gotten together and made some—had gotten together and arranged to control the production of hops through hop-marketing agreements, and they did this by declaring in the middle of the growing season—in July of the growing season, a part of the crop to be unsalable. At the time that the crop was declared—part of the crop was declared unsalable, [5] the grower had already incurred sizable costs, and he still was required to incur other costs to bring the crop to production, even though he was not able to sell the total amount of the crop.

The evidence will further show that Petitioner, or her representatives, knew of these marketing situations early in July, if not before then; that they

were well aware of the declining market conditions, and that they—they were fully aware that the crop—or at least a good part of the crop would not be sellable in the year '52.

The Court: There is a stipulation to be filed?

Mr. Watson: I ask leave to file stipulation of facts, your Honor, with Exhibit 1A attached.

The Court: Very well, the stipulation with attached Exhibit is received in evidence.

You may call your witnesses.

Mr. Flynn: We would like to call Ralph Williams.

RALPH E. WILLIAMS, JR.

a witness called by and on behalf of the Petitioner, first having been duly sworn, was examined and testified as follows:

The Clerk: Please state your name, Mr. Witness, and your address?

The Witness: Ralph E. Williams, Jr., 1985 S. W. 6th Street, Portland.

Direct Examination

By Mr. Flynn: [6]

Q. Mr. Williams, you are the Executor of the Estate of Grace N. Williams, Deceased?

A. Yes.

Q. And during the year 1952, did you manage the Eola Farm? A. Yes.

Q. What experience have you had in the hop business, Mr. Williams?

(Testimony of Ralph E. Williams, Jr.)

A. Well, the experience has existed over since approximately 1940, having been very active in the production of hops and also being active in other—through other companies in the merchandising brokerage—brokerage of hops.

Q. That is, in addition to raising hops, you also were engaged in the business of merchandising or brokering hops—buying and selling? A. Yes.

Q. Did you, during the year 1952, have active operation of any other hop farms? A. Yes.

Q. What type of hops were grown—I should like to explain, at this point, that all of my questions will be directed to the crops and land—river-bottom land on the Willamette River, in Marion and Polk Counties, in the State of Oregon. What type of hops were grown on the Eola Farm during the year 1952?

A. Fuggles and late clusters—seeded late clusters. [7]

Q. Would you explain, please, what is meant by the term “fuggles” and what is meant by the term “late clusters”?

A. They are two distinct varieties of the hop—the fuggles being a type of hop that was developed over in England and was imported here into this country—the roots were imported into this country, possibly in the middle 1920's. As I say, they are of a distinct variety—of a distinctly different flavor and have a distinctly different market, as far as the brewing industry is concerned. I——(interrupted)

Q. Are these——(interrupted)

A. Pardon.

(Testimony of Ralph E. Williams, Jr.)

Q. Are these the type of hop that are known as "seeded," or "seedless" hop?

A. They can be grown either way; however, the fuggle hop generally is what people in the hops trade or the brewers who consume these hops classify as a seeded hop.

Q. Based upon your experience in the management of this and other farms, what, in your opinion, is the average yield of hop to be expected from farms located on the Willamette River bottom land, during a normal year?

A. From six and a half to seven bales per acre; or converting it to pounds, thirteen to fourteen hundred pounds.

Q. That is, a bale of hops contains, what, two hundred pounds? A. Yes. [8]

The Court: Mr. Flynn, he hasn't told us what this other variety was, "late cluster"; do you——
(interrupted)

Q. Oh, I'm sorry. Would you continue then?

A. The "late cluster hop" is a hop again that has an entirely different characteristics from the fuggle hop, and I would say predominantly is the typical—when we think of hops, is the predominant variety. It is—the reason that it is called "late cluster" is that it is harvested somewhat later than the fuggle and somewhat later than some other varieties that——(unfinished answer)

Q. And these two types of hop, that is, the late cluster and the fuggles, were grown on the Eola Farms during the year 1952? A. Yes.

(Testimony of Ralph E. Williams, Jr.)

Q. In what proportions were these hops grown, if you recall—that is, the acreage devoted to each?

A. Approximately one-third and two-thirds—my best recollection was there was about a third fuggles and two-thirds late clusters.

Q. Now, then, you answered my question regarding the yield of hops being from six and a half to seven bales to the acre, in a normal year. Would that apply to both types of hops—that is, is the yield to both types the same, or does one type produce more than the other?

A. I would say that on the average, that the yield is approximately the same.

Q. Was the year 1952 a normal year in the Wilamette River [9] area in Polk and Marion Counties, for the growing of hops, that is, up to July 31st, if you recall?

A. To the best of my recollection, I have no recollection of there being anything unusual.

Q. I should like to ask, are the hop clusters of the type grown on vines on the Eola Farm during the year 1952, fully formed at July 31st, in any normal year? A. No.

Q. Are the clusters fully formed on the vines at the—say, July 31st, of any normal year?

A. No.

Q. Were either the clusters or the fuggles grown on the Eola Farm during the year 1952, fully formed at July 31st, if you recall?

A. I would say no.

Q. Could the quantity of the hop crop be deter-

(Testimony of Ralph E. Williams, Jr.)

mined at July 31st, with any degree of accuracy in an ordinary year?

A. I'm sorry, I didn't understand what you said. Did you say "quality" or "quantity"?

Q. Quantity be determined?

A. Not with any exactness, no.

Q. Not with any exactness. Do you recall whether or not you made any estimate during July 31st, 1952, of the quantity of hops to be obtained from this Eola Farm—that is, if you recall?

A. No, I would say not. [10]

Q. To the best of your recollection now, though, it was a normal year? A. Yes.

Q. To that time? At what time, then, does the hop crop in the Willamette Valley—that is the Willamette River Valley, occur—mature? Pardon me?

A. Historically, fuggles, about the 18th to the 20th of August, and late clusters, generally right after Labor Day, is the yardstick that is generally used. Say, the first week—the latter part of the first week in September.

Q. That is, clusters, some time in the latter part of the first week of September? A. Yes.

Q. And fuggles?

A. Between, generally—generally between the 18th and 20th of August.

Q. Well, if you cannot estimate the—or determine the quantity of the crop you can expect from the vines on July 31st, what is the earliest date on which this quantity can be estimated? Generally?

(Testimony of Ralph E. Williams, Jr.)

A. It—obviously, the closer to the harvest period—in other words, when the hops are mature, the closer that crop may be estimated; but beyond that, I don't believe I could answer your question.

Q. Perhaps, then, you could tell me this: What, if any, is [11] the risk of loss of a hop crop after July 31st, to date of maturity or harvest?

A. Negligible, I would say.

Q. What, in your opinion, and based upon your experience, is the cost of raising a crop to maturity, after July 31st, until harvest—I am speaking now, of crops on the Eola Farm, or in that area?

A. That would range, depending upon labor rates and other possible—other slight variations in price factors, between twenty-two to twenty-five cents a pound.

Q. That is, it would cost twenty-two to twenty-five cents a pound? I don't believe you understood my question, Mr. Williams. I asked the cost of raising a crop from July 31st to—it would be the first week in September or the 18th or 20th of August, when they mature—it is from July 31st on to maturity?

A. Oh, in my other question, I thought you said from the beginning.

The Court: From the time of planting?

A. Yes, from the time of planting. I would say that the cost between July 31st and the time of maturity or the start of harvest is generally a rather negligible item.

(Testimony of Ralph E. Williams, Jr.)

The Court: Well, that doesn't include the cost of your harvesting, does it?

A. No. No, sir, no, we have not touched—
(interrupted).

The Court: There would be some cost of harvesting? [12]

A. Yes, there is substantial cost of harvesting, your Honor.

Q. But the risk of loss, so far as spraying, dusting, is over? A. Yes.

Q. That is, I should say not the risk of loss from spraying or dusting, my question is: Is the risk of loss from downy mildew and these other pests or diseases for which you spray, practically over at July 31st? A. Yes.

Mr. Flynn: I realize that is a leading question, your Honor.

Q. I would like to ask, does the crop of hops growing upon the vines at July 31st—did the crop of hops growing upon the vines at July 31st, on the Eola Farms, have a market value, if you know?

A. I would say no.

Q. Could the crops growing upon the vines at July 31st, have been sold for future delivery upon harvest? A. Yes.

Q. Do you recall what the market price for hops was at July 31st, 1952, of the market price of hops—I refer specifically to the hops—type of hops raised on the Eola Farm?

A. Yes, it ranged between fifty and fifty-two cents a pound.

(Testimony of Ralph E. Williams, Jr.)

Q. Was there a decline or raise in the market price of hops subsequent to July 31st, 1952, if you know? A. Yes. [13]

Q. There was? A. Yes.

Q. And what was this—was there an increase in the price or a decline? A. It was a decline.

Q. Do you recall approximately what the decline in price was?

A. The latter part of August, the market declined to the range of thirty to thirty-five cents a pound; that is my recollection of it.

The Court: Did that continue on through the first week in September?

A. It stabilized itself at about that level, yes.

Q. But it was, to the best of your recollection, fifty-two cents a pound at July 31st?

A. Yes.

Q. You understand, Mr. Williams, that I am speaking of 1952 crop hop? A. Yes.

Q. Which were to be delivered after harvest at some future date? A. Yes, sir.

Q. Well, assuming the market price for hops of this type of fifty to fifty-two cents per pound at July 31st, 1952, what, in your opinion, would be the value of the hops on the vine at July 31, '52? [14]

Mr. Watson: I object to that question. There is no quantity involved.

Mr. Flynn: The witness has already testified that those hops can be sold on the—pardon me—if it please the Court, the witness has already testified that there is a market for those hops for future de-

(Testimony of Ralph E. Williams, Jr.)

livery, and he can qualify in regard to the other cost.

Mr. Watson: Well, as I understood the question, there has only been one element to the formula, and that is assuming a price of fifty to fifty-two cents as of July 31st, what would be the value of some undetermined amount of crop? Maybe I mistook your question, Mr. Flynn.

Mr. Flynn: All right. Perhaps I should rephrase it.

Q. (By Mr. Flynn): Assuming a normal crop of hops at July 31st, 1952—you have testified that they are not, at that time, mature—assuming further that the market price for hops of that type was fifty to fifty-two cents a pound——(interrupted).

Mr. Watson: Are you through?

Q. Not yet. Could those hops have been sold for future delivery? A. Yes.

Q. In arriving at the realization to the grower at July 31st, 1952, and assuming a sale at fifty-two cents for future delivery, what would be the normal cost of harvesting and baling the hops?

A. That would—would range between twenty and twenty-five cents a pound. [15]

Q. Assuming a sale at fifty-two cents on July 31st, and assuming further a cost of twenty to twenty-five cents per pound for harvesting and baling, how would you measure the amount the grower would receive for those hops?

A. By merely deducting the harvest cost from the sale price.

(Testimony of Ralph E. Williams, Jr.)

Q. Were the hops growing on the Eola Farm subject to contract of sale for future delivery at any time up to and including July 31st, 1952?

A. No, they were not.

Q. Did you contract to sell that hop—that hop crop at a later date?

A. No, not in the—they were sold at a later date, but not contracted——(interrupted).

Q. Yes, I understand that.

A. ——to sell for future delivery.

Q. They were not sold to some particular grower at X number of cents per pound, or they were not sold to some particular broker on the usual contract of X number of cents per pound upon delivery?

A. No.

Q. For what reason did you refuse to contract to sell—I will retract that question—did you have any opportunity to contract for the sale of these hops growing on the Eola Farm at any time near, within a few days of July 31st, 1952? Could you have sold them?

Mr. Watson: Your Honor, I think that question is [16] objectionable. There doesn't seem to be any foundation for it. It is pure speculation.

The Court: Well, he can state whether or not he had anyone make any offers or anything of that kind. That would be the only thing I would know that he would know about.

Mr. Watson: I believe, your Honor, he testified that he hadn't had any offers or that there have been no contracts.

(Testimony of Ralph E. Williams, Jr.)

The Court: Let him answer the question.

A. I would have to qualify my answer by saying that I didn't recall—I can't recall whether I had any offers or not, but I didn't intend to sell at that time, though.

Q. You say you did not intend to sell at that time? A. Not at that market level.

Q. And what was the reason, specifically, if you can recall, why you didn't sell?

A. As any hop grower, I thought the market was going to go up.

Q. What was the—what is—what was, during the years 1952 and prior, the average cost of raising hops on Willamette River bottom land to maturity and harvest during a normal year? If you know, and on what yield per acre is your statement based? Now, I don't mean the harvesting. I mean up—the growing, cultivating of fertilizing the hops up to maturity and before harvest?

A. Twenty—twenty—we will say in the range of twenty-two to twenty-five cents a pound; and that figure is based upon average [17] yield, which I indicated ranged from thirteen to fourteen hundred pounds per acre.

Q. Mr. Williams, I hand you Exhibit 1A, will you tell me what it is, please?

Mr. Watson: What—excuse me, what was that last question?

Mr. Flynn: I wanted him to identify Exhibit 1A.

A. This purports to be a copy of the settlement invoice between the firm of Williams & Hart and the

(Testimony of Ralph E. Williams, Jr.)

Eola Hop Farm, for the—covering the 1952 crop of hops.

Q. And does that statement show the pounds of hops grown or harvested on the Eola Farm, for the year 1952? A. Yes.

Q. And what is that poundage?

A. It shows one hundred and fifty-two thousand seven hundred and forty pounds, and a hundred thousand three hundred and fifty pounds, salable allotment.

Q. That is, what became of the hops grown on the Eola Farm which were not sold? That is, the difference between the one hundred thousand pounds that were sold and the hundred and fifty thousand pounds that were grown and harvested?

A. They were destroyed.

Q. And for what reason?

A. Well, they were worthless because we couldn't sell them because they didn't come under the allotment. [18]

Q. Were the hops destroyed—that is, the fifty thousand pounds of hops destroyed, equal in quality to the hops sold? A. Yes.

Q. If you know? A. Yes.

Q. Is it correct that the hundred and fifty-thousand pounds—pardon me, I will retract that. Could you tell me the acreage in hops—planted to hops on the Eola Farms during the year 1952?

A. Roughly, one hundred and fifty acres.

Q. Is it correct to state that the hop production amounts to only five bales to the acre, according to

(Testimony of Ralph E. Williams, Jr.)

that statement? A. Yes.

Q. Do you know or recall why the hop crop grown on the Eola Farm during the year 1952 yielded only five bales to the acre instead of what would have been a normal crop, as you have previously testified? Do you know or recall the reason?

A. Well, I recall the principal reason being that the crop as it matured was of a very friable nature, and we had extreme difficulty with our machine—mechanical harvesting operations and the loss of wastage of hops was exceptionally severe that year.

Q. Reading from that statement, can you tell me when the Eola Farms was paid for the hops sold from the 1952 crop?

A. Well, the statement is dated December 31st, 1952.

Q. Do you know or recall the date on which the hops themselves were sold? [19]

A. Only generally during the months of from October through December.

Q. Generally through October and December. When did the Eola Farms receive notice of the quantity of the 1952 crop of hops it would be permitted to sell, if you can recall?

A. Mid-December of 1952.

Q. That would be the final or the preliminary notice?

A. My recollection was that was the final.

Q. Were—was the Eola Farms notified prior to December of the—a tentative allotment of hops it

(Testimony of Ralph E. Williams, Jr.)

would be permitted to sell from the 1952 crop, if you recall?

A. I can't recall—I can't recall the Control Board practices. They were changed from year to year, I can't recall their practice. Generally, they submitted preliminary allotments on a piecemeal basis, at an earlier date than the final allotment—the issuance of the final allotment.

Q. Do you recall whether they issued any preliminary allotment or preliminary estimate of the amount of hop you would be permitted to sell prior to July 31, 1952; that is, if you can recall?

A. No, they did not.

Q. Am I to understand from your testimony that the final allotment received from the Hop Control Board, was received after the crops were harvested and baled? A. Yes.

Q. When would they be normally harvested and baled? I [20] believe you testified to that once, but——(interrupted)

A. Well, as I indicated, fuggles varieties, harvest generally starts the 18th to the 20th of August, and the late cluster harvest starting in the latter part of the first week in September; the harvest generally completed by the 20th to the 22nd of September, and the hops are of course dried and baled as they are harvested, so I would say that the very last date would probably be—the last bale would be baled probably not any later than October 1st.

(Testimony of Ralph E. Williams, Jr.)

Q. Do you mean that you grew a full crop of hops prior to learning the quantity you would be permitted to sell? A. Yes.

Q. Would your lack of knowledge of the allotment of hops for sale to be granted to the Eola Farm prevent the placing of a market value upon the hop crop, in process of growth at July 31, 1952?

A. Yes

Q. Do you recall the percentage of the total hop crop grown on Eola Farms during the year 1950—1950, which you were permitted to sell by the Hop Control Board?

A. It was, in round figures, eighty-five per cent.

Q. Do you recall the percentage of the total hop crop grown on the Eola Farms during the year 1951, which you were permitted to sell by the Hop Control Board?

A. Again, in round numbers, seventy-three per cent.

Q. Do you recall the percentage of the total hop crop grown [21] on Eola Farms during the year 1952? A. Sixty-five per cent.

Q. It has been stipulated between counsel that the Eola Farms abandoned the growing of hops during the year 1953. Please explain to the Court in your own words, why the growing of hops was abandoned?

A. The—in the winter of 1952 or early spring of 1953, the Hop Control Program was voted out by the hop growers and with the advent of European hops coming back into the market, there just was no

(Testimony of Ralph E. Williams, Jr.)

money to be made domestically in hop production. The net result of it is that the State of Oregon is not even any longer a factor in hop production to speak of.

Mr. Flynn: Thank you, Mr. Williams. Your witness.

Cross-Examination

By Mr. Watson:

Q. Mr. Williams, I think you testified on direct examination that you managed the Eola Hop Farm in the year 1952, is that correct?

A. Yes, I was the—I managed it for my mother, yes, as I managed her other affairs.

Q. And that would apply to the period before the Corporation was dissolved? A. Yes.

Q. And how long prior to that time had you managed the farm?

A. Since my father's death in 1940. [22]

Q. You'd handled your mother's hop affairs—hop-growing affairs for a considerable period of time, is that correct? A. Yes.

Q. Then you were—you were the person who made the decision on dissolving the Corporation, I suppose? A. No, I would say not entirely, no.

Q. Who else would partake in that decision?

Mr. Flynn: If the Court please, that is not a proper question.

The Court: Well, I can't tell, Mr. Flynn. I don't know what the object is.

Mr. Watson: Your Honor, our purpose in this

(Testimony of Ralph E. Williams, Jr.)

line of questioning is to show that some time in July of 1952, or even earlier than that, Mr. Williams or his associates, were well aware that there would be a loss, and that was one of the reasons they dissolved the Corporation and transferred the assets—the growing hop asset to the Petitioner. We want to show that they were well aware at that time that there would be no market value to speak of for these crops, and that a loss would be sustained.

Mr. Flynn: May it please the Court, I don't think that is material to the issue of the market value of that crop.

The Court: Well, I can't tell, Mr. Flynn, and if it is not material, I can always disregard it, so I will hear what he has to—(interrupted)

Mr. Flynn: All right, sir. [23]

The Court: —say about it, and if it is not material to the issue in this case, I assure you that I will not consider it in evidence.

The Witness: Would you repeat the question, please?

(Previous question: "Who else would partake in that decision?"—repeated by Reporter at this time.)

A. I assume you want to know the peoples names, sir?

Q. Yes, please.

A. Well, one person of course, would—who was naturally involved was my mother—whose property was involved. Another person who was advisory was

(Testimony of Ralph E. Williams, Jr.)

my mother's attorney, Burton L. Coan; then I would say other people to whom I had talked, and we had talked, relative to the future—anticipated future of the propagation of hops for profit in the State, in this area.

Q. Now, what were the considerations in making that decision?

A. The considerations in making that decision were to—that after a determination had been made that the hop crop—or I should say that hops would no longer be grown on this farm—premises, that we would endeavor to rent the farm to a tenant farmer for other purposes and that the—that it would be just too complicated to have a corporation in the way any more, from a bookkeeping standpoint, where we would only be receiving one rent check, and with no liability, and for just from an expense as well as a bookkeeping and an office problem. [24]

Q. Do I understand you correctly that one of the primary factors in that decision was your determination that the growing of hops was no longer profitable?

A. It was not a determination that the present growing of hops was no longer profitable, but that it would not be profitable for the 1953 and forward seasons.

Q. Well, why was it then that the decision was made in the middle of the 1952 growing season?

A. The only thing I can say is that was about the time we got around to it.

Q. Had the decision been under consideration

(Testimony of Ralph E. Williams, Jr.)

prior to that time? A. Yes.

Q. Is it your testimony then that the decision to dissolve the Corporation was not primarily based on the realization that a loss for the growing of the hop crop in 1952 would be realized?

A. I'm sorry. I got the negative or the positive——(interrupted)

Q. Well, let me rephrase the question then?

A. Please.

Q. Is it not true that one of the primary reasons for dissolving the Corporation in 1952 was the realization that a loss would be sustained on the 1952 crop? A. No.

Q. Mr. Williams, have you ever been a member of the Hop [25] Control Board? A. Yes.

Q. Were you a member in 1951? A. Yes.

Q. Were you also a member in 1952?

A. Yes.

Q. And did you generally participate in the meetings? A. Yes.

Q. And as I understood your earlier testimony, you have been associated with hop growing for years and years, is that correct?

A. That's right; yes.

Q. Do you recollect the date in 1952 when the hop—Hop Control Board met to make their recommendation as to salable quality to the Secretary of Agriculture?

A. I don't recall the date, sir, but generally—generally it was held—that meeting was generally held in mid-July.

(Testimony of Ralph E. Williams, Jr.)

Q. Would the date of July 17th, 1952, be approximately correct? A. Yes, I would say so.

Q. And that recommendation that was made by the Hop Control Board was accepted by the Secretary almost as a matter of course, wasn't it?

A. Yes.

Q. And in July, then, of 1952, the Board did reach a decision on the salable quality—salable quantity, did they not? [26] A. Yes.

Q. And you knew the results of that decision, didn't you, Mr. Williams? A. Yes.

Q. And am I not substantially correct in saying that at that time they recommended that about thirty-six point one per cent of the total crop be declared unsalable?

A. That would not be the function of the Hop Control Board at that time. They would only set the potential—the possible—what the demand for hops would be, not how big the crop was going to be.

Q. Well, didn't they consider, in reaching their decision, what the total production would likely be?

A. That did not constitute any element whatsoever in that determination.

Q. You mean at the time they met, they didn't have any idea then what the over-all hop production would be?

A. They would have—they would have estimates, yes.

Q. Well, those estimates were generally pretty reliable, were they not?

(Testimony of Ralph E. Williams, Jr.)

A. Sometimes, they have been—sometimes they are and sometimes they aren't. They are merely estimates. But the Control Board only—only sets the salable quantity—so many million pounds available—that would be available for sale.

Q. But for a person in your position, who was well aware of [27] marketing conditions and quantities grown and the effect of a decision of this sort, you could readily interpret what the result would be as far as this crop was concerned, could you not?

A. You mean how much the cut would be?

Q. Yes.

A. I would say within reasonable bounds, yes.

Q. Then, some time in July, you had—had fairly sound reason to believe that at least thirty-five per cent of the '52 crop would not be salable, is that not correct?

A. I would say only from recollection—my recollection probably wouldn't be that close, but I would say that it would be within that range, yes.

Q. And isn't it also a fact that because of your close association with the hop-growing industry you were reasonably certain that that would be the last year of control on hops?

A. No, there were just—there was considerable discontent among the hop growers, but if my recollection serves me correctly, it wasn't—it didn't make itself known until some time—some time considerably later in the fall.

Q. Was it the general feeling in the hop-growing industry that if the controls were taken off, the

(Testimony of Ralph E. Williams, Jr.)

the market would fall away to a considerable extent? A. Yes.

Q. And that's actually what happened, isn't it?

A. Yes. [28]

Q. And is it not also true that for a considerable period of time prior to the end of controls, there had been a decrease in the amount of acreage planted to hops each year?

A. No, I believe if anything, and it is only recollection—that if anything, there was a slight increase in acreage.

Q. There was an increase in acreage?

A. I think—that would be purely from recollection as to the last couple of years, maybe I had better say that I don't know.

Q. Well, let me ask you once again then. Is it your testimony that the fact—is it your testimony that an anticipated loss on the 1952 crop was not one of the factors—one of the primary factors in your decision to dissolve the Corporation in 1952?

A. It was not one of the primary factors, no.

Q. Was it a substantial factor in that regard?

A. No, I would say not.

Q. You may have explained this before, but what, precisely, were the reasons for dissolving in the middle of the growing season?

A. As I indicated, the determination that the—that that particular acreage—or that particular field would be taken out of hop production, because the hop business had the appearance, as far as 19—as far as the subsequent year of 1953—that it was

(Testimony of Ralph E. Williams, Jr.)

not the type of business—in other words, it would become risky, with no control—was not a business for a widow to be in, and that the ranch was going to be leased for some other purpose, and if there was no longer any reason to have a Corporation, as I said, from a [29] bookkeeping standpoint, and standpoint of execution of papers and all the other details that are incident thereto.

Q. Now, what then was the purpose for forming a Corporation some seventeen months prior to that time?

A. At that stage of the game—I mean—game, I'm sorry. At that stage, the hop business looked like it was going to be on a fairly level plane for quite a number of years, and that in consequence, the earnings of the farm would level themselves out, and for—it was that reason that the Corporation was formed.

Q. Isn't it a fact that your mother had considerable income from other sources during all these years?

Mr. Flynn: I have an objection, your Honor, that is not material.

The Court: I will permit the witness to answer. The objection will be overruled.

Q. Yes, and she had considerable income from other sources in the year 1951, is that not so?

A. I can't recall exactly, sir, but I don't recall if there were any conditions that would cause too much deviation from her ordinary income.

Q. Coming back to the decision in 1952, now

(Testimony of Ralph E. Williams, Jr.)

to dissolve the Corporation, was one of the considerations the fact that your mother might possibly be the beneficiary of a carry-back loss involved in the decision?

A. I have no distinct recollection. As I said, I—it might [30] have been a consideration, as taxes are with everything you do nowadays.

Q. But you don't have any distinct recollection on that point?

A. Not that it was any primary——(interrupted)

Q. Well, was it——(interrupted)

A. I say that—yes, I would assume that probably it was undoubtedly discussed.

Q. Then your testimony is that it was a factor involved in the decision? A. Yes.

Q. Then I understand you correctly then that you did contemplate that there would be a loss on the 1952 crop? A. No.

Q. Well, I thought you previously testified that you thought it might be possible for your mother to get a carry-back loss?

A. If there was a carry—if there was a loss, yes, sir.

Q. But you considered it as a possibility—there was a distinct possibility there would be a loss on the 1952 crop?

A. In July, I can't think there—that there was anything in the picture that would indicate that—that would indicate that there was a loss, with a

(Testimony of Ralph E. Williams, Jr.)

sixty-five per cent salable allotment, of course, it was obvious there would not be too much profit.

Q. And was it also true that the market had been rather soft during that time?

A. Yes, it was—it was inactive, as I recall, from——(unfinished answer) [31]

Mr. Watson: I have no further questions.

Mr. Flynn: I have two more questions, if you please.

The Court: Let's hasten along, gentlemen, so we can conclude this.

Mr. Flynn: All right.

Redirect Examination

By Mr. Flynn:

Q. Mr. Williams, I ask you, were you not aware that the Internal Revenue Code provided—contained a provision enabling a sole stockholder to obtain the assets of a corporation without paying any tax thereon during the year 1952? A. Yes

Q. Were you further aware that the sole stockholder obtained these assets, subject to certain restrictions, at the same cost basis to the Corporation during the year 1952?

Mr. Watson: I object—I object to that, your Honor. I don't there—I don't think there is any evidence in the record about the cost basis.

Mr. Flynn: If it please the Court, we have stipulated what the cost basis is.

The Court: Well, you are asking something that

(Testimony of Ralph E. Williams, Jr.)

probably no one but a lawyer could answer, Mr. Flynn; however, I am going to let him answer—whether or not he had been advised that, or somebody—or whether somebody had given him the information. [32]

Mr. Flynn: If it please the Court, my question is directed to this: Counsel has contended that the purpose of dissolving during the year 1952 was to obtain a substantial operating loss. I wish to point out to the Court that the taxpayer had competent advice to remind him that he could have obtained the same effect by tax-free liquidation.

The Court: I think that is the way you should examine him—ask him whether or not he had been advised to that effect, and not whether he knows it.

Q. (By Mr. Flynn): Mr. Williams, were you so advised by counsel? A. Yes.

Q. I would like—there was one question that did confuse me—I didn't get the answer—could you tell me, please, if you recall, when the controls were taken off?

A. My recollection was it was some time in the spring of 1953.

Q. In 1953. Thank you.

The Court: No further questions?

Mr. Flynn: No further questions.

Mr. Watson: No further questions.

The Court: Very well, you may stand aside, sir.

(Witness excused.)

The Court: Call your next witness, Mr. Flynn.

Mr. Flynn: We would like to call Frank [33] Kennedy.

FRANK KENNEDY

a witness called by and on behalf of the Petitioner, first having been duly sworn, was examined and testified as follows:

The Clerk: Please state your name, sir, and your address.

The Witness: Frank Kennedy, Independence.

Direct Examination

By Mr. Flynn:

Q. What is your occupation, Mr. Kennedy?

A. Farming.

Q. And do you engage in a particular type of farming?

A. I had been growing hops.

Q. For how long have you been growing hops?

A. About thirty-five years.

Q. Where have you been growing hops for the past thirty-five years, is it in one location?

A. Yes, Horst (phonetic) Ranch at Independence.

Q. How far is the Horst Ranch in Independence from the Eola Farm, if you know? Approximately?

A. Our line is about a half a mile from the boundary.

Q. Were you, during the year 1952, familiar with other farms in the vicinity of your farm and the crops raised on these farms at that time?

A. Yes, I was.

(Testimony of Frank Kennedy.)

Q. What kind of crops were raised? [34]

A. Well, around that district, mostly hops were grown.

Q. Is the land in that area, the area of the Horst Farm—Horst Farm, of the same general type as that on which you conduct operations at the Horst Farm—I mean—by that, I mean, is the Horst Farm located on river bottom land? A. It is.

Q. Do you know whether the Eola Farm is also located on river bottom land? A. Yes, it is.

Q. Was the Eola Farm used for growing hops in 1952? A. Yes.

Q. What variety of hops were grown on the Eola Farm during 1952, if you know?

A. They grew the two varieties—the popular varieties, fuggles and clusters.

Q. Are these the type of hops that was raised on the farm that you operate?

A. The same, yes.

Q. What is the average yield of seeded hop to be expected from Willamette River bottom land in that area, if you know—during a normal—the average yield in a normal year?

A. I'd say five and a half to seven bales to the acre.

Q. What was the average of cost of production of hops to maturity and before harvest during the year 1952, if you know?

A. Well, it would just be an estimate. We usually figure [35] that our growing costs up to harvest are twenty to twenty-five cents a pound, and

(Testimony of Frank Kennedy.)

I'd say the average is probably twenty-two and a half cents.

Q. Do you mean that it would cost twenty-two and a half cents per pound of actual hops produced, or is this average cost based upon the estimated yield of five and a half to seven—(interrupted).

A. Well, it would be either the—you—your actual costs are what you produced, but you could—you usually figured on an estimated yield.

Q. And your statement of twenty-two and a half cents, is that what I understood?

A. Twenty-two and a half.

Q. Is based upon an estimated yield?

A. On a general average.

Q. Yes, I understand.

A. For a normal year.

Q. Based upon your experience, is it possible to determine with any degree of accuracy, the yield of seeded hop vines at July 31st of any year, growing—with those vines growing on Willamette River bottom lands?

A. Not with any degree of accuracy. You can always estimate a crop, but it may be off as much as thirty per cent or we may be—I mean, under thirty per cent or over ten or fifteen, you very seldom are over. [36]

Q. I am speaking of July 31st, now?

A. Yes, I know.

Q. That is—am I to understand then, that the crop can either increase or decrease as much as thirty per cent during the remaining period until

(Testimony of Frank Kennedy.)

they mature? A. I think so.

Q. Do you recall whether the seeded hops grown on Willamette River bottom land, during 1952, were matured at July 31st? A. No.

Q. Based upon your experience, and assuming a market value for baled seeded hops of fifty to fifty-two cents a pound, what, in your opinion, would be the fair value of a normal crop of seeded hops on the vine at July 31st?

Mr. Watson: I object to that question. There is no quantity in it again.

Mr. Flynn: If the Court please, the witness has testified that it is not possible to estimate the crop on July 31st. I'll restate—I'll withdraw the question.

Mr. Watson: Maybe I don't understand the question, your Honor—I can't see where he is going to get a value if he doesn't have the quantity factor.

Q. Well, would you, as a grower of hops, sell your crop at July 31st of any year for less than the cost of production—the average cost of production to which you have testified? A. No. [37]

Q. During the year 1952, would you have sold your growing crop of seeded hops for less than thirty cents a pound on July 31st, provided the market price at that date was fifty cents per each pound of hops that you could deliver after harvest?

A. Will you please ask that question again?

Mr. Flynn: Would you read that question back, please?

(Testimony of Frank Kennedy.)

(Previous question repeated by Reporter at this time.)

A. Certainly not.

Q. Do you know whether there was a crop failure affecting hops during the year 1952?

A. There was none.

Q. There was none. Do you know of any abnormal weather conditions—do you know or can you recall any abnormal weather conditions prior to July 31, 1952, which would have retarded or curtailed the growth of the hops prior to July 31 of that year?

A. I don't recall anything on that.

Mr. Flynn: Thank you.

Cross-Examination

By Mr. Watson:

Q. Mr. Kennedy, I believe that you testified that you wouldn't sell your hops in any year for less than the amount of your incurred expenses, is that correct?

A. On July 31st.

Q. Why on July 31st?

A. Well, the crop was made, and I certainly wouldn't sell it [38] for less than the profit. I would want a profit out of it, because I had done all the work and I have invested all the money.

Q. Well, assume that your expenses are forty-five cents per pound, and that the market at that—the future market is nonexistent, and somebody offered you twenty cents per pound, would you then sell it?

(Testimony of Frank Kennedy.)

A. If the—if the market was forty-five—(interrupted).

Mr. Flynn: If I may ask the Court's indulgence, counsel has not, as he pointed out to me, qualified his question by relating it to the production of hops. Is he talking about forty-five per cent of the hops actually harvested some month or two months later, or is he talking about forty-five cents per pound of the estimated crop at July 31st?

The Court: Reframe your question, Mr. Watson. I think the question is clear, but reframe it to be sure, so we won't have to read it back.

Q. Mr. Kennedy, assume that you have costs of thirty cents a pound on your hops, and that all of a sudden the demand for hops was completely eliminated—the future demand for hops is completely eliminated, and you were well aware of that fact, and as of July 31st, 1952, of any year, somebody offered you fifteen cents a pound for those hops, you'd sell then, wouldn't you?

A. Well, I don't think I would, no.

Mr. Watson: I have no further questions.

Mr. Flynn: No questions. [39]

The Court: Very well, you may stand aside.

(Witness excused.)

The Court: Any further witnesses?

Mr. Flynn: Yes, two witnesses, and I will try and make them brief, your Honor.

The Court: Very well.

Mr. Flynn: Roy Nelson, please.

ROY NELSON

a witness called by and on behalf of the Petitioner, first having been duly sworn, was examined and testified as follows:

The Clerk: Please state your name and your address, for the record.

The Witness: My name is Roy Nelson; I live at Salem, Oregon.

Direct Examination

By Mr. Flynn:

Q. What is your occupation, Mr. Nelson?

A. I am a vice president of the United States National Bank.

Q. In Salem? A. Yes, sir.

Q. Do your duties involve the making of loans on agricultural crops? A. I do.

Q. Are you familiar with the crops grown on Willamette—that were grown on Willamette River bottom land in Polk and Marion [40] Counties during the years 1952 and prior? A. I am.

Q. Are you familiar with the hop business, having made loans?

A. I have made loans to hop growers on both the production of hops and for hops after harvest.

Q. How long have you been making such loans for the bank, Mr. Nelson?

A. Almost thirty years.

Q. Do you or your bank make loans on growing crops prior to maturity and harvest?

(Testimony of Roy Nelson.)

A. On practically all advances on growing hops, they are made prior to maturity.

Q. Did you or your bank make such loans during the year 1952? A. I think so.

Q. To the best of your recollection you did?

A. Yes, sir.

Q. Based upon your experience as a loan officer, what is the average yield of seeded hops to be expected on hops grown on Willamette River bottom land, if you know?

A. The yield, of course, will vary with the farming operation, but we generally estimate that the yield should be anywhere from a thousand to fourteen, fifteen hundred pounds per acre, broken down into bales, that would be anywhere from five to seven and a half [41] bales.

Q. All right. Based upon your experience as a loan officer, and assuming an average yield of hops on Willamette River bottom land, and assuming further a market price for hops of fifty to fifty-two cents per pound, what formula would you have used in determining the amount of loan—a loan to be made upon a crop of hops growing at July 31, 1952?

A. You mentioned a price ranging from fifty—fifty-two cents——(interrupted).

Q. Yes.

A. ——or in that neighborhood. We would probably discount the price just a little bit to be on the safe side, and deduct from that, what we estimate the harvest costs to be, which hardly ever are less than twenty cents and sometimes as much as

(Testimony of Roy Nelson.)

twenty-five cents, and we would aim to confine our loans then to a maximum of what could be reasonably expected to be received for that particular crop, whether it were hops, corn, potatoes, mint, or what have you, over and above the harvesting costs. On the hypothetical question that you posed there, Mr. Flynn, if the market price were fifty cents deducting from that at least twenty cents or perhaps more for harvesting costs, we would loan a maximum of one-half of the difference of thirty cents, or roughly fifteen cents per pound on the estimated crop, at that stage.

Q. Can we summarize that as saying that you take the market price, deduct the harvest costs, plus a little margin for safety [42] and end up with fifty per cent of the balance?

A. That is exactly what I meant to convey.

Q. Would you have made such a loan upon the Eola crop during the year 1952, had such loan been requested?

Mr. Watson: Now, I object to that, your Honor. I don't think he's competent to answer that question.

The Court: I think it is highly speculative. I don't think we can limit it to one, but would you have made that to Eola or any other reputable firm? Let's not limit it to one firm.

Q. Would the amount arrived at by your formula as the amount of a loan be more or less than the cost of growing a hop crop upon river bottom land—answer from your experience, if you know

(Testimony of Roy Nelson.)

A. It would be less. The theory behind that, of course, is that we would like to have the borrower have something in the production of the crop himself.

Q. That is, you would not lend what you consider to be the full value of the crop?

A. That's right.

Q. Based upon your experience as a loan officer, what, in your opinion, was the average cost of growing a crop of hops on the Willamette River bottom land to harvest time during the year 1952, if you can recall?

A. A pretty good average would be twenty-five cents—twenty-five cents a pound. [43]

Q. By average of twenty-five cents a pound, do you mean twenty-five cents a pound upon the actual hops produced or upon the estimate of the hops to be produced?

A. No, on the actual amount of hops produced. That's before picking costs.

Q. Yes, I understand that. Do you recall whether there was a failure of the hop crops in the Willamette River area during the year 1952?

A. Not to my recollection, no.

Q. Based upon your experience and knowledge of the hop industry, how closely can a crop of hops be determined at July 31st, in the Willamette River bottom land area of Marion and Polk Counties?

A. Well, it has been my observation that at that stage, July 31st, the crop is practically made through. It has to mature some more before it is

(Testimony of Roy Nelson.)

ready for harvest, but at that stage, you can definitely determine and estimate quite closely of what the crop will be, and the danger from practically all hazards has passed by that date.

Mr. Flynn: Thank you, Mr. Nelson.

Cross-Examination

By Mr. Watson:

Q. Mr. Nelson, referring to your formula that you use in making the loans, would the fact that thirty-five per cent of the crop would be declared unsalable at the end of the year affect your formula at all? [44]

A. Certainly, to the—to that extent.

Q. It would affect it to that extent?

A. Yes.

Q. And the result would be that you would not loan on the full amount of the crop, would you?

A. Not during the years when your allotments were in effect.

Mr. Watson: That's all.

The Court: Are you through with this witness?

Mr. Flynn: Yes, I am, your Honor.

The Court: You may stand aside, sir.

(Witness excused.)

Mr. Flynn: Mr. C. W. Paulus, please.

C. W. PAULUS

a witness called by and on behalf of the Petitioner, first having been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Flynn:

Q. Mr. Paulus, what is your experience in the hop business?

A. I have been interested in and operating in the hop business since 1933.

Mr. Watson: Your Honor, for the purposes of this trial, we will stipulate that Mr. Paulus is a qualified hop man.

The Court: Very well.

Q. Where are you presently employed, Mr. [45] Paulus?

A. Vice President of Williams & Hart, Oregon Corporation.

Q. The Williams is the Ralph E. Williams in this case? A. Yes.

Q. In your capacity as Vice President, what—approximately what volume of hops do you buy and sell each year?

A. Oh, from a volume of twenty-five thousand bales down to seven, eight, ten thousand bales.

Q. You are familiar with the types and varieties of hops grown on Willamette River bottom land in Polk and Marion Counties? A. Yes, sir.

Mr. Flynn: If it please the Court, may I lead the witness a little bit? I can speed it up.

The Court: I beg your pardon?

(Testimony of C. W. Paulus.)

Mr. Flynn: If it please the Court, may I lead the witness a little bit? I can speed this up.

The Court: Unless counsel objects, you may do so.

Mr. Watson: No objection.

Q. (By Mr. Flynn): You are familiar with a hop farm called Eola and the variety of hops raised on that farm during the year 1952? A. Yes.

Q. What kind of hops were grown there?

A. Fuggle hops and late cluster hops.

Q. Can you recall or estimate the frequency of your visits to the Eola farm during the period in which the hops were growing on the vines during the year 1952? [46] A. Yes.

Q. How do you so recall?

A. The visits were quite frequent, in view of the fact that the Eola Hop Ranch was located on the way to the McLaughlin (phonetic) Farm, which Williams & Hart was operating, and I would pass by Eola Farm on the way to the McLaughlin Farm.

Q. Did you assist in any way with the management of the Eola Farm during the year 1952?

A. No.

Q. Did you have an opportunity to observe the growth and development of the crop of hops grown on the Eola Farm during the year 1952, particularly up to July 31? A. Yes.

Q. Was the year 1952 up to July 31 a normal year for growing hops, if you can recall?

A. To my recollection, it was a normal year.

Q. Based upon your experience with crops of

(Testimony of C. W. Paulus.)

Q. Hops grown on Willamette River bottom land, can you state the average yield of seeded hops which could be expected to be obtained from such lands in a normal year?

A. Did I understand you to inquire if I anticipated that the normal——(interrupted).

Q. What would be the average yield of seeded hops on Willamette River bottom land, during a normal year?

A. From six and a half to seven—seven and a half bales. [47]

Q. Do you recall whether the hops observed by you while growing on the Eola Farm were equal to the average of hops grown—growing on other farms on the Willamette River bottom lands in Polk and Marion Counties, as observed by you during the year 1952?

A. I would say that it was about the normal prospect.

Q. Is land on which hops were grown by the Eola Farm during 1952 the type from which such yield could be expected? A. Yes.

Q. When do hops of the type grown upon the Eola Farm, and upon your own farm, mature?

A. The fuggle hops, the early hops, about August the 20th to the 26th, and I am stating that since there were several years that we began our harvest operation on the fuggles as late as the 26th and 27th, and on the late hops, the late cluster hops, from, oh, the 5th of September to as late as the 10th and 11th of September.

(Testimony of C. W. Paulus.)

Q. Is it possible to determine the quantity of a hop crop of this type—of the type grown upon the Eola Farm during the year 1952 at July 31st, under normal conditions?

A. It is possible to estimate, yes, but not possible to determine.

Q. Why isn't it possible to determine it accurately? A. There's so many—(interrupted)

Q. Explain in your own words.

A. —other factors that may come into the maturity problem. As a matter of fact, as of July 31, the hops are in the bloom. You [48] cannot determine whether or not—they may finally make hops, so-called. It is a flower that is merely budding and that hop, which is a flower, may not even come into maturity. It may—it could be burned off, so far as that is concerned. It doesn't happen very often, but the equation is there that you cannot make a determination as of July 31.

Q. But you can estimate the crop?

A. Estimate, on the basis of vine growth.

Q. What would—with what degree of tolerance in your opinion?

A. Oh, I would say, a bale or two bales' tolerance variance.

Q. That would be two to four hundred pound per acre? A. That's right.

Q. Is your recollection of the period prior to July 31, 1952, favorable or unfavorable to the growth of hops in the Willamette River bottom land area?

(Testimony of C. W. Paulus.)

A. My recollection, the growing—during the growing period, conditions were favorable.

Q. Do you recall the prevailing market price at July 31, '52, for baled and dried hops of the seeded variety growing on the Eola Farm during that year, 1952?

A. It was around forty-nine to fifty-two cents.

Q. Do you know whether the hops grown—growing on the Eola Farm at July 31, 1952, were subject to—under—to sale, [49] under contract at that day?

A. They were not.

Q. Isn't it true that you or your firm usually bought the hops on the Eola Farm?

A. Yes.

Q. When, to the best of your recollection, did your firm buy the 1952 allotment of crop available for sale by Eola Farm?

A. I don't know the exact dates, but it was subsequent to October 1, and between October 1 and December—early December, I would say.

Q. You have testified that you also managed the Williams & Hart Farms, Inc., or Williams & Hart—Will Hart (phonetic) Farm, I guess you would call it, during the year 1952?

A. Didn't manage it, no.

Q. The McLaughlin Ranch?

A. Did not manage the Fairfield (phonetic) or Will Hart Farm, no.

Q. You did not. How is the value of a growing crop of hops determined, if you know? I'm sorry, how is the value of a growing crop of hops at maturity determined, if you know?

(Testimony of C. W. Paulus.)

A. I don't know whether——(interrupted).

Q. Perhaps I will retract that question and get at it some other way. How is the market price that is to be bid for seeded hops determined? Would you explain in your own words?

A. Which is—the determination of market price is a [50] competitive factor in the trade, and largely evaluated and on the basis of what the brewing trade will pay for hops in domestic competition and or foreign competition.

Q. Could the value of the crop growing on the Eola Farm at July 31 have been determined by you?

A. It may have been estimated, but not determined.

Q. Could you have sold the crop growing on the Eola Farm at that time?

A. Yes, we could have sold it, had the Eola Corporation been willing to sell.

Q. A factor in the selling would be also a question of the determination as to the allotment of hops you would be willing to sell, or be permitted to sell—Eola would be permitted to sell, pardon me?

A. That would have been a factor, yes.

Q. When, to the best of your recollection and knowledge, did you first receive notice of what the allotment would be for the farms in that area?

A. Tentative allotment, to my recollection, the latter part of October and the final allotment was just a few days before Christmas, it might have been the 18th or 20th of December.

(Testimony of C. W. Paulus.)

Q. Do you recall—I may have asked this question—I have skipped quite a little here—do you recall whether—at what dates or approximately what dates you purchased the hop crop grown on Eola Farms?

A. I can't say what date, unless we refer to—refer to the [51] records——(interrupted).

Q. Well, approximately what time?

A. ——I would say between October and December, in 1952, at various times.

Q. Had you received your notice of your tentative allotment—oh, you testified that it was during October, didn't you? A. That's right.

Q. Is it correct to state that the purchases you made of the Eola crop during and after October were intended to be for delivery after Eola was informed by the Hop Control Board of the proportion of the 1952 crop it would be permitted to sell?

A. That's right.

Q. Did you purchase the entire crop of hops grown on the Eola Farm during the year 1952?

A. No, we merely purchased the salable percentage.

Q. Do you recall what the salable percentage of that crop was during the year 1952?

A. Slightly in excess of sixty-five per cent.

Q. Did you buy or sell the 1951 hop crop raised on the Eola Farm? A. Yes, we did.

Q. What proportion of the 1951 crop was permitted to be sold by the Hop Control Board, if you recall?

(Testimony of C. W. Paulus.)

A. It is my recollection that it was about seventy-four per cent.

Q. Seventy-four per cent and sixty-five per cent in 1952? [52] A. (Affirmative nod.)

Q. Did you buy or sell the 1950 hop crop raised on the Eola Farm? A. Yes.

Q. What proportion of the 1950 hop crop was permitted to be sold by the Eola Farm?

A. That was slightly in excess of eighty-five per cent.

Q. That is, the amount of the percentage of crop that you would be permitted to sell, would then have a very material bearing upon the revenues to be derived from that crop, is that correct?

A. (Affirmative nod.)

Q. Did you at any time have any information prior to the harvest of the hop crop, of the allotments to be made by the Hop Control Board?

The Court: In what year?

Q. In—during the year 1952, I'm sorry.

A. No formal information, no.

The Court: Well, did you have any informal information?

Q. Yes; did you—(interrupted).

The Court: Of any kind?

A. I was not in attendance at the Control Board meeting, and the fact is, was absent during most of the part—most of July, after the middle of July was gone for two weeks, and following that, I can not recall, but unquestionably had conversation

(Testimony of C. W. Paulus.)

with Mr. Williams, but had no formal information as to what the Secretary [53] would determine as the salable percentage.

The Court: I see. Very well.

Q. Do you recall whether there was any change in the market for seeded hops after July 31st, 1952?

A. Yes.

Q. What was the nature of the change, and when did it occur, if you recall?

A. In late August—I refer to the end of August, and in September, there was a drop in the market; as a matter of fact, an average of—from thirteen to fifteen cents per pound in price. Later, then, that carried through until September. Later in October, the market advanced again—picked up more in November, and then in December, reached a point where it was higher than it was at any time in July, and even higher than it was earlier in the year. My recollection is that the market for seeded hops in December was up to fifty-two, -three cents, and on seedless, up to sixty-two, sixty-three cents.

Q. The hops grown on Eola would be seeded?

A. Seeded, yes.

Mr. Flynn: That is all. Your witness.

(Testimony of C. W. Paulus.)

Cross-Examination

By Mr. Watson:

Q. Mr. Paulus, what caused the drop of the market in August of 1952, do you happen to know?

A. I can't say what it is. That happens very often in the [54] market. Brewers have bought their supplies that they may feel they wish to commit themselves for just prior to that time, and then wait and see what the ultimate crop may be. As a matter of fact, that is happening right today, in the market.

Q. You were a member of the Hop Control Board in 1952, I suppose? A. I was not.

Q. You weren't a member then?

A. (Negative nod.)

Q. You were aware of the procedure the Hop Control Board followed, though, were you not?

A. Oh, yes.

Q. Was it your understanding that the recommendation made by the Hop Control Board was fairly certain to be adopted by the Secretary of Agriculture?

A. I would say that I speculated that it may not be.

Q. It may not be, but as a matter of fact, in the years that the program was in operation, the decision of the Board was adopted, was it not?

A. Not in all cases, no.

Q. Was there any sizeable change between the

(Testimony of C. W. Paulus.)

recommendation in the amount that was finally—and the amount that was finally declared to be not salable?

A. In 1950, there was a five-thousand-bale variance, which percentagewise, as against the total quantity, may not sound very much, [55] but can make or break a market. Five thousand bales may do that in the hop industry.

Q. In 1951, the recommendation was adopted, was it not?

A. Yes, very nearly, is my recollection; yes.

Q. Were you a member of the——(interrupted).

A. I never have been a member of the Hop Control Board.

Q. Never were? A. No.

Q. As a grower, though—I mean, as a dealer, you kept pretty close tabs on what the Board recommended, did you not?

A. To the extent that information was available, yes. It was our business to.

Q. It was very vitally so, wasn't it not?

A. I say, it was our business to maintain information on it, yes.

Q. But the amount of the crop that was declared to be salable each year was probably the main factor in determining whether you made a profit or not, was—is that not so? A. Not entirely.

Q. No, not entirely, but it was a substantial factor, was it not?

A. It had an influence, yes, but was not the—was not the entire basis, since the growers voted in

(Testimony of C. W. Paulus.)

the marketing agreement in order to make it a profitable business.

Q. But wasn't it true that the growers usually had to incur [56] almost all their costs before they—before the salable allotment was made—well, they had to incur all their growing costs, no matter whether they could sell the total crop or not?

A. Largely; largely, yes, since these determinations were not made by the Control Board until some time in July, so the major portion of the growing costs were already incurred, that is correct.

Q. So if thirty-five per cent of the crop was declared to be unsalable, you had sizeable costs tied up in thirty-five per cent that you couldn't expect to realize, now, is that not correct?

A. If you had known that to be the fact, yes. And I qualify that by saying that that fact was not determined until the Secretary of Agriculture made that decision.

Q. But weren't most growers and dealers fairly well advised as to what the recommendation would be—what the salable percentage would be in July of the growing year?

A. They knew what had been discussed at the Control Board session—some who were there did others may have gotten it by word of mouth, but it was definitely not determined that year that the recommendation may be accepted by the Secretary of Agriculture, since it was in percentage quantity so much higher than anyone had anticipated, or that

(Testimony of C. W. Paulus.)

he Secretary had previously approved on any commodity, as I understand it.

Q. Then it is your testimony that the growers and the dealers didn't estimate that the unsalable quantity in 1952 would be anywhere near as large as it was? [57]

A. I would say it this way: That there was considerable thinking that the salable quantity may not be determined on the basis of the Control Board's recommendation, by the Secretary of Agriculture.

Q. I don't think that's responsive to the question. I think I asked if they were aware or is it your testimony that they didn't think that the unsalable percentage would be as high as it was?

A. State that once more, if you will, please.

Q. Well, did the dealers and growers feel that—or understand at that time, in July of '52, that the—was it their feeling that the unsalable percentage would not be nearly as high as it turned out to be?

A. I would qualify my answer again by stating that I was not—not at the Control Board meeting in July, 1952; however, it is my—it is my recollection of the information that I received that they did not assume—the dealers and growers did not assume that the percentage—surplus percentage would be as high as it was recommended or finally as designated by the Secretary of Agriculture.

Q. Well, did they believe that it would be, say, ten per cent less than it actually turned out to be?

A. I don't think that they figured that it would

(Testimony of C. W. Paulus.)

be any more than twenty-five per cent at the most or even less than that.

Q. What would you say that the general market condition was in 1952?

A. May I refer to a little memorandum that I obtained in [58] my office yesterday?

Q. Well, I would prefer it if you would just answer it on your recollection, or——(interrupted).

A. I think I can hit it pretty well. The 1952 market did not open up until in February, on 1952 crop hops—this is on a forward contracting basis, and on seeded hops, which includes fuggles and clusters—these late clusters, such as were grown on McLaughlin—or Eola Farm, was around fifty-two to fifty-five cents, and seedless clusters from fifty-five to sixty cents. In March, on fuggle hops, there was considerable contract buying at fifty-two cents, and on seeded clusters, at about the same figure, from fifty to fifty-two cents; with seedless up to fifty-five to sixty cents. In April, it was a nominal market, with offerings of forty-nine to fifty-two cents on seedless—or seeded and fifty-five to sixty on seedless. And May, it was a nominal month. There wasn't too much activity. June, likewise, and the early part of July, toward the end of July and the early part of August, the market on seeded was from forty-nine to fifty-two cents and on seedless up to sixty cents. Then the latter part of August and during September, as I previously testified, the market had recessions and there was a drop from thirteen to fifteen cents in both seeded and seedless

(Testimony of C. W. Paulus.)

and maintained itself until up into October. In the middle of October, the markets again became more active and rose, and through October-November, the markets went up to forty-five to fifty cents on seeded and fifty-five on seedless, and, finally, in December, rose to fifty to [59] fifty-three, I believe, on seeded and sixty to sixty-three on seedless. That is my recollection.

Q. As a dealer, did you consider the market in 1952 to be fairly unsteady?

A. It had periods, yes, of unsteadiness. This statement advises you.

Q. Did you consider it to be a declining market during that period?

A. There were declining soft spots in it, but at the end of the period, the market strengthened.

Q. But isn't it true that the hop industry generally was suffering from a serious over-production situation?

A. Yes, there was over-production, as manifested by the surplus percentage that was finally set.

Q. In 1953, when the controls went off, a great deal of acreage was withdrawn from hop production, is that not true?

A. It began to be taken out, yes.

Q. And in 1952, most dealers and growers were anticipating that sort of situation, were they not?

A. I think not.

Q. You think they were not? A. No.

Q. Wasn't there discussion at that time that the controls would probably go off? A. No. [60]

(Testimony of C. W. Paulus.)

Q. Wasn't there any feeling that there would have to be a considerable cut-back in production?

A. That may have been considered, but the biggest shock the hop industry had was when the control was voted out.

Q. Then it is your testimony that the dealers and growers, as you knew the situation, didn't think that the control was going off? A. No.

Q. Who voted for the decontrol?

A. The growers.

Q. The dealers didn't participate?

A. (Negative nod.)

Q. But the growers were the ones——(interrupted).

A. The growers were the ones that did it, and you could not tell how that election was going to go. The Secretary of Agriculture controlled the election. By that, I mean, counted the votes.

Q. Yes, but he didn't have——(interrupted).

A. He made the determination.

Q. The growers made the determination?

A. The growers cast the votes and the Secretary of Agriculture made the determination.

Q. The tabulation?

Mr. Watson: That's all I have.

The Court: Any further questions?

Mr. Flynn: That's all, your Honor. [61]

The Court: Very well, sir, you may stand aside. By the way, Mr. Clerk, did you get this man's name?

The Clerk: Would you give me your name?

(Testimony of C. W. Paulus.)

The Witness: C. W. P-a-u-l-u-s.

The Clerk: What is your address?

The Witness: 866 Oak Street, Salem, Oregon.

(Witness excused.)

The Court: You may call your next witness.

Mr. Flynn: Petitioner rests, your Honor.

The Court: Petitioner rests.

(Petitioner rests.)

Mr. Watson: Respondent would like to call Mr. Carl Richardson.

The Court: Very well.

CARL RICHARDSON

a witness called by and on behalf of the Respondent, first having been duly sworn, was examined and testified as follows:

The Clerk: State your name, please, and your address?

The Witness: Carl Richardson.

The Clerk: Harold?

The Witness: Carl; 2540 S.E. 47th, Portland.

The Clerk: C-a-r-l?

The Witness: C-a-r-l.

Direct Examination

By Mr. Watson: [62]

Q. Mr. Richardson, where do you work?

A. For the U. S. Department of Agriculture.

(Testimony of Carl Richardson.)

Q. And what is the nature of your work?

A. I am in charge of their Grain Market News Branch.

Q. Now, how long have you been in that employ?

A. Since 1948.

Q. And in the years 1950, '51 and '52, were you employed in the same line? A. Yes.

Q. Would you explain a little more in detail what your work entails?

A. Well, the Market News Branch gathers and disseminates market information on agricultural commodities.

The Court: Speak out a little louder, Mr. Witness, so I can hear you, and also to be sure that the Court Reporter is getting your testimony.

A. Do you want me to repeat that, sir?

The Court: You can speak into that microphone there.

A. Shall I repeat that?

Q. Yes, if you would, please.

A. The Market News Branch gathers and disseminates market information on agricultural commodities to the trade in general—growers, dealers and Federal agencies, State and County agencies.

Q. And what is the source of your [63] information?

A. Growers, dealers, as well as for market information—current market information, and we supplement that by statistics on stock, hops and crop estimates, export and import data.

Q. Then it is your function to correlate all o

(Testimony of Carl Richardson.)

his material and put it up in the form of a bulletin for the farmers, is that correct?

A. Yes, we issue what we call a Hop Market Review, monthly, except in the harvesting season, and we put a report out twice a month.

Q. And that Review covers the general market situation and deals with the various factors that would be of interest to the farmers, is that right?

A. That's right.

Q. And this Review also dealt with the hop crop, is that correct? A. Yes.

Q. And at my request, have you had occasion to re-examine your files for the last few years?

A. I have.

Q. And you have looked over your past bulletins, is that correct? A. Yes, in a general way.

Q. And you have refreshed your memory with respect to hop conditions in the past years?

A. That is correct. [64]

The Clerk: Exhibit D for identification.

(Respondent's Exhibit D, Witness Richardson, marked for identification.)

Q. I will show you what purports to be Respondent's Exhibit D and I will ask you to identify, please (exhibit handed)?

A. Yes, I prepared this report.

The Court: I can't hear you, Mr. Witness.

A. I prepared this report.

Q. And what does the Exhibit purport to be?

A. This is the Season Average Price, Oregon

(Testimony of Carl Richardson.)

Hops. It shows the type of sale, and equivalent on vine returns per pound to growers, covering the years 1939 through '55.

(Exhibit handed and examined by Mr. Flynn.)

MR. FLYNN: May it please the Court, Petitioner will object to the introduction of this testimony on the ground and for the reason that the average for the year would have nothing to do whatever with the valuation of the hop crop on a particular date or the fluctuation in market prices; and for the further reason that this states that it is for the Oregon, whereas, the hops which are the subject of this dispute are grown in a limited area, namely, Polk and Marion Counties.

THE COURT: Well, that will only affect its weight and sufficiency. I will overrule the objection and receive it for whatever it may be worth and taking into consideration that that is, I presume, based on the hop industry throughout the United States and not on the [65] hop industry in the Willamette Valley.

Q. Now, that's correct, isn't it, Mr. Richardson?

A. That report is for the whole State of Oregon yes.

THE COURT: Oh, for the State of Oregon?

MR. FLYNN: The entire State.

A. The entire State of Oregon.

THE COURT: The entire State of Oregon; not for one particular location.

(Testimony of Carl Richardson.)

A. Yes, that is correct.

The Court: Very well.

A. It is the weighted price, however.

Q. It is offered for the Court's information and you——(interrupted).

The Court: Very well, for whatever it might be worth, I will receive it in evidence.

(Whereupon, Respondent's Exhibit D for identification, Witness Richardson, received in evidence.)

Q. (By Mr. Watson): Based upon your examination of your bulletins, Mr. Richardson, what would you say was the general hop market condition in the year 1952?

A. Well, in the—the crop year 1951-52, with supplies well above market needs, prices declined quite steadily through the—through most of the '51-'52 crop year. Domestic demand was slow and, however, towards the end of 1952, there was a rally in demand, both domestic-wise and for export. This carried into the '52-'53 crop [66] year, where we had slight price advantage, and then there were—there have been periods of real dull conditions, and then there would be a little flurry, and sometimes the market was just inactive and void of any transactions to determine what the market prices might be. I did note that in late 1952, that there was a little flurry of activity which carried—which carried into early 1953.

The Court: Do you think that was due to the

(Testimony of Carl Richardson.)

cutting down of the salable allotment, or what was the cause of that——(interrupted).

A. That was partly true, and, of course, we had a little better foreign demand. I think our exports sales were a little higher in '52 than they were.

The Court: Very well.

Q. But the general trend from 1950 on was a downward trend, is that not so?

A. Your trend and prices is definitely downward.

Q. Now, you—in your re-examination of your bulletins, did you have occasion to look at the acreage planted to hops in Oregon for the years 1951, 1952 and 1953 and 1954? A. Yes.

Q. And what did that examination show?

A. Well, that shows a—a—from 1950—'52, the decline in acreage was some two thousand acres.

The Court: That is from 1950 to '52?

A. '51 to '52, sir, and from '52 to '53, it was nearly six [67] thousand acres. And further decline in the last couple of years has been rather small but it is still declining.

Mr. Watson: That's all the questions that have.

Mr. Flynn: I have a few questions, if you please

(Testimony of Carl Richardson.)

Cross-Examination

By Mr. Flynn:

Q. I understood you to say that you referred to in your testimony the 1951-1952 crop year. What period do you——(interrupted).

A. That, sir, is from—from September through August, is the crop year.

Q. September of one year to August of the next, is that correct?

A. Yes, through August of the next.

Q. And these statistics of yours are based upon from September to August——(interrupted).

A. Crop year basis, uh-huh.

Q. And from what source do you—first, are hops sold or quoted on any exchange? A. No.

Q. They are not?

A. No public market for——(interrupted).

Q. From what source do you obtain the information regarding the tabulation of the hop?

A. As I stated before from——(interrupted).

Q. Oh, I didn't hear——(interrupted).

A. I beg your pardon?

Q. I didn't hear you before, I'm sorry.

A. From dealers and growers of hops.

Q. Approximately how many growers and dealers report to you, do you know?

A. Well, not exactly, but—varies—of course, the number of dealers declined considerably, too.

Q. Do you judge that by the reason in the re-

(Testimony of Carl Richardson.)

duction of the number of reports you received, or from some other source?

A. I don't believe I understood that.

Q. Here is what I am trying to get at: I am trying to find out—I seem to be having a little difficulty asking my question, but that is what I want to know—how many dealers or how many growers report to you for the purpose of preparing the——(interrupted).

The Court: Are they numerous?

Q. Are they numerous?

A. Yes, numerous report——(interrupted).

Q. How many are there in Oregon?

A. That particular report there is qualified as a source of the Crop Reporting Service. We reproduced it, the Market News Branch.

Q. Yes, I understand that, but I don't think you have yet answered my question. What proportion of the growers in Oregon [69] report to you? Is this report compulsory?

A. No, it isn't compulsory.

Q. It is not compulsory. Well, then, perhaps you can tell me or estimate to the best of your knowledge, how many of the total hop growers report their sales to you from which you made this analysis for this Market News Report?

A. I told—that particular report that you are referring to is put out by the Crop Reporting Service, the Agricultural Estimate people, and I have reproduced it.

Q. Then getting back to your previous test

(Testimony of Carl Richardson.)

mony, your year runs from September of one year to September of the next, is that correct?

A. September through August.

Q. September through August. Then how would your report be—let us say, a sale of 1952 hops made as of August, 1952, would that be reported in the 1951-52 year, or would it be reported in the 1952-53 year?

A. In August, that would be reported in the 1951-52 year.

Q. It would? A. In August of 1952.

Q. Yes.

A. It runs from September 1 through August.

Q. Well, then this report—this annual average value that you have, does not really include the 1952 crop in the 1952-53 or '52 year or the 1953 crop in the '53 year, you would have—it [70] would seem to me that you would have material overlapping, is that correct? A. No.

Q. You mean the hops are not sold on contract prior to August of any year?

A. No, I wouldn't say that.

Q. Well, you just said that it wouldn't overlap, and you previously told me that the—a sale in let's say July or August of this year's crop would—(interrupted). A. Of what year's crop?

Q. Well, we can use this year, '51-52, it doesn't matter?

A. Okay; okay—all right. A sale made in August of this year would be included in the 1955-56 crop year.

(Testimony of Carl Richardson.)

Q. Made in August, because it runs from what—August 31st—from August to September?

A. It runs from September 1 through August 31st, a crop year, on hops.

Q. That is what I am trying to get at. The sales that were reported to you, then, are analyzed and dropped into the proper year, is that right?

A. Yes.

Q. Proper crop year? A. Sure.

Q. I understood you to say a while back, when I asked you if the hops sold under contract prior to August 31st would be reported [71] in the '51-52 year instead of the '52-53?

A. Now you have got me confused.

Q. Well, we're even.

A. Well, here is the crop year, it runs from September 1 through August 31st.

Q. Yes.

A. I don't know what more you want to know.

Q. Well, here's what I am trying to——(interrupted).

Mr. Watson: Your Honor, I don't see the purpose for this line of questioning. The Exhibit is merely presented to show what the general market prices were in these years. It has no more import than that.

The Court: I can't see that's material, Mr. Flynn, what crop year—what year you put your particular crop.

Mr. Flynn: I am attempting to show here—my next question was going to be directed towards the

(Testimony of Carl Richardson.)

number of hop ranches in Oregon, if he knew, because that statement, as I understand it, would include hops grown east of the mountains as well as hops grown in the valley, and they are not the same kind, are they?

A. No, there's different varieties of hops raised in Oregon. They are not all one kind.

Mr. Flynn: That's all.

Mr. Watson: That's all, Mr. Richardson.

(Witness excused.) [72]

Mr. Watson: If the Court will indulge us, we have one more witness, but it shouldn't take very long.

The Court: Well, let's hasten along, please.

Mr. Watson: We call Mr. Eaton, please.

ROBERT H. EATON

witness called by and on behalf of the Respondent, first having been duly sworn, was examined and testified as follows:

The Clerk: State your name and address for the record, please?

The Witness: Robert H. Eaton, 1218 S.W. Washington, Portland, Oregon.

Direct Examination

by Mr. Watson:

Q. Mr. Eaton, what is the nature of your employment?

A. I am Officer in Charge of the Northwest Marketing Field Office of the Fruit and Vegetable Division, USDA.

(Testimony of Robert H. Eaton.)

Q. For how long have you been so employed?

A. I have been employed as Officer in Charge since August, '53, and as assistant in charge since October of 1948.

Q. In connection with this work, did you perform some function in carrying out the hop-marketing control agreement?

A. That's correct, the Control Board is the industry committee that administers the marketing agreement, and the actions they take are in the nature of recommendations and the Secretary of Agriculture considers those recommendations along with other [73] pertinent data and issues the final regulations pursuant to the Marketing Agreement Act, under which the authority for it falls.

Q. Well, in the years 1951 and 1952, the Hop Marketing Agreement was in effect, is that correct?

A. That's correct.

Q. And during those years, you were a representative for the Department of Agriculture in carrying out that agreement?

A. That is correct.

Q. And did you associate with these Hop Control Boards? A. I did.

Q. And I think maybe you have testified what the Hop Control Boards are, but would you explain that a little further—just exactly what the Hop Control Board was?

A. Well, very briefly, under authority provided in the Agriculture Marketing Agreement Act of 1937, the hop industry put into effect an agreement

(Testimony of Robert H. Eaton.)

which gave them the authority to attempt to bring their supplies in balance with demand, and by doing that, they—the Administrative Board met each late summer and considered prospective demand and established what is known—what was known as a salable quantity, which they felt the trade could consume and reflect a fair return to the grower.

Q. These Boards were made up of growers, is that correct?

A. Growers and dealers——(interrupted).

Q. Growers and dealers——(interrupted).

A. ——and brewers. [74]

Q. And brewers? A. That's right.

Q. And then the industry itself really controls the production, is that——(interrupted).

A. It was entirely an industry program, financed by the industry and administered by the industry under the supervision of the Department of Agriculture to assure compliance with the Act under which they operated.

Q. And when did this Board normally meet to make their decision about the amount of production? A. Normally, in late summer.

Q. Late summer? A. Yes.

Q. In the year 1952, what was the date of the meeting?

A. The Board met and considered the subject of salable quantity on July 17th, 1952. They made their recommendations to the Secretary of Agriculture, who considered them along with other pertinent data provided in the order and issued a

(Testimony of Robert H. Eaton.)

notice of salable quantity on August 7th, and gave anybody opportunity to file objections or arguments to that notice, and on August 28th, as published in the Federal Register, he issued the final salable quantity of thirty-nine million two hundred thousand pounds.

Q. Well, then, if I understand your testimony correctly, this decision was made by the Hop Control Board on the 17th of July, and the decision was passed on to the Secretary of Agriculture [75] for his adoption at that time, is that right?

A. The Committee made their recommendations, that is correct. The Secretary is the one that makes the decision.

Q. In your experience working with this Board, is it true that the Secretary substantially adopts the recommendations from the Control Board?

A. He is required under the terms of the order to give consideration to the Board's recommendation as well as to other statistical information available to him. It is true that considerable weight is given to the Board's recommendations, since they have been elected to represent the industry. He does sometimes follow it, and sometimes deviates from it slightly.

Q. Then, the Board takes into consideration the amount of the estimated crop as of this July date and the amount of the estimated crop that can be sold, and then they reach a percentage of salable and non-salable crop, is that correct?

A. No, the Board merely estimates the demand

(Testimony of Robert H. Eaton.)

for which they feel the brewers can consume, considering the carry-over, and establishes a salable quantity. The surplus percentage is determined by dividing this salable quantity as established by the Board and finally approved by the Secretary, by the crop production as it is finally turned out to be.

Q. But for a grower or a dealer—he can reasonably estimate what the salable percentage will be once the Hop Control Board makes its decision, isn't that correct? [76]

A. Once the Board has made their recommendations and assuming the Secretary has approved it, anyone—dealer, grower or anyone, can take the current estimates of crop production and make the calculation himself.

Q. Then it is possible, and it is the usual practice to consider that the salable percentage has been fixed as of the date the Hop Control Board makes its decision, isn't that so?

A. Not fixed, no. It's dependent upon what the crop turns out to be, which may vary some either way, depending upon how the crop finally turns out. But, taking within reasonable bounds, I think you can say yes.

Q. But in the years here in question, 1951, 1952, there was no substantial deviation from the figure that was set up by the Control Board, was there?

A. The salable quantity as recommended was adopted, that is correct. The surplus percentage was not finally established, of course, until every last bale was weighed, by the Board, until every last un-

(Testimony of Robert H. Eaton.)

harvested acreage was estimated by the Board and figures established. However, beginning with July 1 each year, the Crop Reporting Service makes an estimate of total crop production, and they make that monthly, and using that monthly crop production and the Board's recommendation, assuming that it—based on the assumption that the Secretary approve it, you could come up with an estimate of what the surplus might be. But again, there—that estimate on July 1 is released on July 10th, so from the period— [77] the figure you are using in making this rough calculation is a July 1 figure, and the August 1 figure does not become available until August 10th.

Q. Well, as a matter of fact, in 1952, the unsalable percentage didn't change from July 17th until the end of the crop season, did it, to any substantial degree?

A. Well, I will have to check my figures—I don't believe it varied. As I said earlier, it was within reasonable—if I make a reasonable estimate, I think it varied maybe a couple of per cent from the beginning to the end.

Q. Not more than two or three per cent?

A. As I recall, it was in that vicinity, yes.

Mr. Watson: That's all I have.

Mr. Flynn: I have a few questions I would like to ask you.

(Testimony of Robert H. Eaton.)

Cross-Examination

By Mr. Flynn:

Q. Does the Board set the production of the hops—the quantity to be produced?

A. No, that's——(interrupted)

Q. It does not. The Board does say, if I understand your testimony correctly, that you can sell a specific quantity of what is grown, is that correct?

A. It established a total salable quantity, that is correct.

Q. Now, I understood you to say that you—I understood [78] you to say that a notice was furnished to the growers early—what happened if they sold hops—sold their hops based upon that notice, and it later turned out that the percentage was reduced?

A. The salable or surplus percentage?

Q. Salable, we are talking about?

A. The salable quantity is, and its effect on what a grower could sell, took precedence over contract, so——(interrupted)

Q. By that, then, this notice that you furnished them in August was not final, was it?

A. No, as I testified earlier, the final—when we are speaking in terms of the percentage, the final depends upon the final production.

Q. And that final production is determined when? In the year 1952, since that is the year we are talking about?

(Testimony of Robert H. Eaton.)

A. May I check my notes here?

Q. Certainly.

A. (After checking notes): Well, it was approximately December 15th that I can——(interrupted)

Q. I have December 20th.

A. That is—I don't find the notice that was sent out right now, although I could furnish it——(interrupted)

Q. Now, there is just one other question, I think. What happened in those instances where the crop—you have testified that you obtained estimates of the total crops—of the total crop to be produced, also of the total hops that could be used or purchased [79] by the brewer. What happened if a material portion or any portion of the crop that you estimated to be produced turned out to be of poor quality?

A. The only limitation——(interrupted)

Q. Isn't it possible——(interrupted)

A. ——on quality was leaf and stem content.

Q. Isn't it true that where a part of a crop was of poor quality, a grower could sell all of his hops by just buying certificates, one having good quality hops? Let's say that we——(interrupted)

A. That was true in the '51-'52 marketing season. The order was amended, effective for the '52-'53 crop, limiting the grower's salable quantity to the quantity he harvested within the salable quantity.

Q. All right, but wouldn't it also be true there that if the hops were of poor quality, he could sell

(Testimony of Robert H. Eaton.)

—and he had harvested them, he could sell those certificates to someone—some neighboring farm who had good quality hops?

A. If he harvested them?

Q. Yes. A. Yes.

Q. Isn't that true? A. Yes.

Mr. Flynn: I think that's all.

Mr. Watson: That's all.

The Court: Very well, you may stand aside, sir. [80]

Mr. Watson: That's all, Mr. Eaton, thanks very much.

The Witness: Thank you, sir.

(Witness excused.)

The Court: No further testimony?

Mr. Watson: No further testimony.

The Court: No further testimony?

Mr. Flynn: No further testimony, your Honor.

(Respondent rests.)

The Court: Very well, gentlemen, what is your pleasure in regard to time for filing briefs?

Mr. Flynn: May we have forty-five days to file petitioner's brief, your Honor?

The Court: Very well, what day will that fall on?

The Clerk: June 18th.

The Court: Petitioner's original brief to be filed on or before June 18th; Respondent, thirty days from that, will that be enough?

Mr. Watson: Yes, that will be enough.

The Clerk: July 18th.

The Court: Respondent's answer brief to be filed on or before July 18th. Will twenty days be enough on the reply?

Mr. Flynn: Yes, your Honor.

The Court: And the Petitioner is given until August——(interrupted)

The Clerk: August 7, your Honor. [81]

The Court: ——7th to file his reply brief.

There is nothing further in connection with the case, gentlemen?

Mr. Watson: No, your Honor.

Mr. Flynn: No, your Honor.

The Court: We will be recessed until 10:00 o'clock Monday morning.

(Whereupon, at 5:15 o'clock p.m., the hearing in the above-entitled petition was closed.)

Filed May 29, 1956, T.C.U.S.

RESPONDENT'S EXHIBIT B

United States Department of Agriculture
 Agricultural Marketing Service
 Grain Division
 345 U. S. Court House
 Portland 5, Oregon

May 3, 1956.

Oregon Hops: Season Average Price,¹ Type of Sale and Equivalent on Vine Returns Per Pound to Growers, 1939-1955:

Crop Year	Open Market	Contract	All	Equiv. on Vine
1939.....			.25	.15
1940.....			.26	.15
1941.....			.30	.16
1942.....	.82	.37	.46	.28
1943.....	.65	.61	.62	.42
1944.....	.66	.66	.66	.45
1945.....	.64	.64	.64	.43
1946.....	.62	.62	.62	.40
1947.....	.54	.70	.67	.42
1948.....	.37	.55	.49	.26
1949.....	.54	.52	.53	.35
1950.....	.65	.59	.59	.38
1951.....	.57	.65	.65	.43
1952.....	.34	.63	.61	.38
1953.....	.35	.47	.46	.24
1954.....	.22	.47	.44	.22
1955.....			.40	

Note: Weighted average contract and open market sales.

Source: Agricultural Estimates, USDA, AMS.

CARL R. RICHARDSON,
 Market News Br.

Admitted in evidence May 4, 1956.

[Title of Tax Court and Cause.]

Filed October 29, 1956

MEMORANDUM FINDINGS OF FACT AND OPINION

This proceeding involves income tax deficiency for the taxable years 1951 and 1952 in the amount of \$2,806.69 and \$13,060.19, respectively.

The sole contested issue is the fair market value of a certain growing hop crop on July 31, 1952, on which date the decedent acquired the crop, among other assets, in exchange for capital stock of Eola Hop Farms, Inc., as a liquidating dividend.

Findings of Fact

The stipulated facts are found accordingly.

The growing hop crop here in question was planted on the Eola Hop Farms located in Marion County, Oregon. This farm consisted of a total of approximately 165 acres, of which 149.5 acres were planted to hops.

Prior to 1950, the farm had been owned and operated by Grace N. Williams (hereinafter referred to as the decedent) and a co-partner, under the partnership name of Williams and Thacker. In 1950, the interest of the co-partner was purchased by the decedent, and thereafter until March 1, 1951, the decedent operated the business as a sole proprietorship. On March 1, 1951, all the assets and liabilities

of the sole proprietorship were transferred by decedent to Eola Hop Farms, Inc., a corporation, in exchange for all of the capital stock of the corporation. From March 1, 1951, to July 31, 1952, the farming business was carried on by the corporation. Thereafter, farming operations were again carried on by decedent as a sole proprietorship. In 1953, the hop vines were pulled up and the growing of hops abandoned.

The corporation reported a loss of \$8,597.33 for its operations for the period from March 1, 1951, to December 31, 1951. For the seven months ending July 31, 1952, a loss was reported by the corporation in the amount of \$339.12; however, in the computation of such loss the expenses incurred by the corporation in planting hops in March and caring for the 1952 crop up to July 31, 1952, were not deducted but were carried on the balance sheet of the corporation as an asset in the amount of \$44,165.66. This sum was carried over and utilized by the decedent in computing the loss attributable to the 1952 hop crop. In addition to the above-referred-to expenses incurred by the corporation the decedent, operating as a sole proprietor after July 31, 1952, incurred further harvesting and marketing expenses attributable to the hop crop in the amount of \$42,015.89.

The receipts from the sale of hops for the years 1950, 1951, and 1952, and the expenses incurred attributable to such receipts are as follows:

Year	Reported Hop Receipts	Reported Expenses
1950	\$108,246.42	\$85,820.81
1951	88,506.31	82,826.96
1952	46,445.72	86,181.55

The total crop production for 1952, in terms of pounds, the salable quantity of the crop, the amounts sold, and the unit price per pound received and the total receipts for the 1952 hops are shown by the following:

1952 Crop Hops

Total crop—per Hop Control Board.....	152,740 pounds
Salable percentage	65.7%

Salable allotment100,350 pounds

Sales	Bales	Pounds	Price	Amount
Jos. Schlitz Brewing Co.....	246	48,716	52¢	\$25,332.32
Hans Hinrichs Hops Co., Inc. 32		7,643	67¢	5,120.81
Paul Reinemann Co.....	1	228	42¢	95.76
Paul Reinemann Co.....	13	2,399	42¢	1,007.58
Yakima Chief Ranches, Inc..	226	45,697	34¢	15,536.98
	518	104,683		\$47,093.45
Certificate purchase		2,399	27¢	647.73
	518	102,284		\$46,445.72

No contracts for the sale of the 1952 hop crop to dealers or users or any other persons had been executed by either the corporation or the decedent as of July 31, 1952.

The net income reported by decedent for the year 1950 was \$36,241.51; for the year 1951, \$30,344.40. In her Federal income tax return for 1952 decedent reported a net farm loss on the operation of the Eola Farms in the amount of \$43,385.90. When this loss was offset against other income received by the

decedent in 1952 the result, as reported on her tax return, was a net loss of \$8,731.03.

The average cost of planting and cultivating hops on lands in the vicinity of the Eola Farms during the year 1952 was from 22 to 25 cents per pound, and the average cost of harvesting and baling was from 20 to 25 cents per pound.

The growing crop of hops distributed to the decedent was not matured on July 31, 1952, and the risk of loss from mildew and other crop diseases was practically nonexistent at that date. The crop matured during the latter part of August and the early part of September, 1952.

The average market price for the type of hops grown on the Eola Farms as of July 31, 1952, was between 49 and 52 cents per pound. In the latter part of August the price range was between 30 and 35 cents per pound. In the middle of October the market became more active and through November ranged from 45 to 50 cents per pound, and during December the price ranged from 50 to 53 cents per pound.

The hop industry has been suffering from serious overproduction since 1950. The market, for the most part of 1952, was relatively inactive. Under the Agriculture Market Agreement Act of 1937, the industry put into effect an agreement providing the industry with authority to bring supplies in balance with demand. The agreement was administered by a Hop Control Board made up of growers, dealers,

brewers, and Government representatives. The Board met in the late summer of each year and made a survey of prospective demand and other factors which might affect market conditions. It determined what they considered to be the salable quantity of crop then planted—a quantity which the trade could consume and which would reflect a fair return to the grower. The Board made a recommendation as to salable quantity, which was transmitted to the Secretary of Agriculture for final decision. The Secretary considered the recommendation of the Board, along with other pertinent data, and issued a final salable quantity. In general, the Board's recommendation as to the salable quantity was adopted by the Secretary without substantial change. In the year 1952, the Board's recommendation did not vary more than one or two per cent from the final decision made by the Secretary of Agriculture.

The over-all salable quantity for the hop industry determined by the Secretary was a percentage of each grower's crop and the growers could not market more than such established percentage. Nevertheless, it was necessary for each grower to harvest all his crop, including the unsalable portion.

The salable percentage of each grower's crop was slightly in excess of 85 per cent in 1950; approximately 74 per cent in 1951, and in 1952 it was 65.7 per cent.

The Hop Control Board met on July 17, 1952 and made its recommendation to the Secretary of

Agriculture as to the salable quantity of the crop for that year.

R. E. Williams, Jr., a son of decedent and executor of her estate, had long been active as a grower and dealer in hops. He was a member of the Hop Control Board and in 1952, participated in its deliberations which resulted in recommending that approximately 36 per cent of the crop be declared nonsalable.

Williams managed the Eola Farms in 1952, and had managed it since 1940. He handled the decedent's hop-growing affairs in 1952 and for a considerable time prior thereto. He also participated in the decision to dissolve the corporation on July 31, 1952.

The fair market value of the growing crop of hops on the Eola Farms property on July 31, 1952, was \$11,500.

Opinion

LeMire, Judge:

The question presented requires a determination of the fair market value of a growing hop crop on July 31, 1952, on which date the decedent acquired the crop as a liquidating dividend.

The petitioner contends that the fair market value of the growing hop crop was not determinable on the critical date in question because the decedent was not willing to sell the crop at less than the cost of planting and cultivating the crop up to the date

of the transfer, which cost was in the amount of \$44,165.66. This position is premised on the usual definition of the term "fair market value" as the price at which a seller willing to sell at a fair price and a buyer willing to buy at a fair price, both having knowledge of the facts, will trade.

The respondent determined the fair market value of the crop as of July 31 to be the amount of \$4,375.40, which was calculated by deducting from the total farm revenues for the year 1952, the total cost of the operations of the farm for the period August 1 to December 31, 1952.

We do not think the contention advanced by either of the parties furnishes the correct solution to the question in controversy.

The statute requires a valuation of the property at the critical date involved. The determination of value is a factual one. No fixed formula is controlling, but the facts of probative force serve to fix value.

We are here dealing with a special property which we think admits of no accurate determination, and in such cases recognition is given to the rule of reasonableness and common sense.

The record shows that on the critical date the crop was matured to the extent that from then on harvest-time the risk involved from mildew and disease was negligible so that the yield in pounds could be approximately estimated; the range in bid pri

and cost of harvesting the crop in pounds were known.

On July 17, prior to the critical date, the Hop Control Board had made its recommendation to the Secretary of Agriculture as to the percentage of the 1952 crop that would be salable. The decedent's agent, R. E. Williams, Jr., was a member of the Board and was aware of its recommendation, as were hop growers and dealers generally. While the Secretary of Agriculture made the final decision as to the percentage of the hop crop that would be salable, and such decision was made at the end of the year, it was known that it was the general practice of the Secretary to adopt the Hop Control Board's recommendation.

In making our determination each specific factor and such facts as might be reasonably anticipated, as of the valuation date, have been accorded such weight as in our judgment the facts and circumstances require.

We, therefore, have found as an ultimate fact that the fair market value of the growing hop crop in question, as of July 31, 1952, was \$11,500.

Decision will be entered under Rule 50.

Served October 29, 1956.

Entered October 29, 1956.

The Tax Court of the United States

Docket No. 57441

ESTATE OF GRACE N. WILLIAMS, Deceased,
RALPH E. WILLIAMS, Executor,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to the Court's Memorandum Findings of Fact and Opinion, filed October 29, 1956, the respondent filed a computation which the petitioner agrees is in accordance with the opinion. Therefore it is

Ordered and Decided: That there are deficiencies in income tax for the taxable years 1951 and 1952 in the respective amounts of \$2,217.79 and \$8,532.14

[Seal] /s/ C. P. LeMIRE,
Judge.

Entered December 12, 1956.

Served December 13, 1956.

United States Court of Appeals
for the Ninth Circuit

Tax Court Docket No. 57441

[Title of Cause.]

PETITION FOR REVIEW OF DECISION OF
THE TAX COURT OF THE UNITED
STATES

To the Honorable Judges of the United States
Court of Appeals for the Ninth Circuit:

The Estate of Grace N. Williams, deceased, by
Ralph E. Williams, Executor, the petitioner in this
cause hereby files a petition for the Review by the
United States Court of Appeals for the Ninth Cir-
cuit of the decision of The Tax Court of the United
States, entered on December 12, 1956, T. C. Memo.
1956—239.

I.

Jurisdiction

The petitioner on Review is the duly qualified and
acting Executor of the Estate of Grace N. Williams,
deceased August 20, 1954, under letters testamentary
issued by the Circuit Court of the State of Oregon
for the County of Multnomah, Department of Pro-
bate on September 29, 1954. The individual income
tax returns of Grace N. Williams for the calender
years 1951 and 1952 were timely filed with the Di-
rector of Internal Revenue for the District of Ore-
gon, whose office is located at Portland, Oregon,

within the jurisdiction of the United States Court of Appeals for the Ninth Circuit.

II.

Nature of Controversy

The controversy involves the proper determination of the petitioner's liability for federal individual income taxes for the calendar years 1951 and 1952.

The decedent was the sole stockholder of Eola Hop Farms, Incorporated, an Oregon corporation engaged in the business of hop farming in Marion County, Oregon. On July 31, 1952, Eola Hop Farms Incorporated, distributed to the decedent as a liquidating dividend all of its assets consisting of 165 acres of land of which 149.5 acres were planted to hops together with the buildings and equipment necessary to operation of the farm.

The sole contested issue before the Tax Court was the fair market value of the crop of hops growing upon the lands distributed to the petitioner by Eola Hop Farms, Incorporated, as of July 31, 1952. The expenses incurred by the corporation during the period from January 1 to July 31, 1952, for the planting, care, and cultivation of the growing crop of hops amounted to \$44,165.66. This sum was carried on the balance sheet of the corporation as an asset (prepaid expense) at the time of distribution to the decedent.

The contention of the petitioner was that the fair market value of the growing crop distributed to the

decendent could be established by a sum in excess of a figure representing the market price bid for hops of the type raised on the Eola Farm as of July 31, 1952, less the estimated costs of harvest and baling multiplied by the estimated yield of hops per acre, and that the value so ascertained was not less than the costs of production of the crop to the date of distribution, i.e., \$44,165.66.

The decendent reported receipts from sales of the 1952 hop crop in the amount of \$46,445.72 and expenses of \$86,181.55. The latter sum included \$44,165.66 claimed by the decendent as the fair market value of the growing crop received in liquidation of the Eola Farms, Inc. The resulting loss was absorbed in part by the decendent's income from other sources and in part by a claim for an operating loss carry-back to income of the year 1951, for which she received a refund of income taxes previously paid.

The respondent, Commissioner of Internal Revenue, determined the fair market value of the growing crop at July 31, 1952, to be \$4,375.40. The respondent's determination was arrived at by deducting from the total farm revenues, the costs of operation of the farm from August 1 to December 31, 1952.

The respondent's determination that the fair market value of the crop distributed to the decendent was \$4,375.40 instead of the sum of \$44,165.66 claimed by the decendent resulted in an increase in

the taxable income of the decedent for the year 1952 of \$39,790.26 and the elimination of the loss carry-back claimed by the decedent against income of the calendar year 1951.

The Tax Court found as an ultimate fact that the fair market value of the growing crop distributed to the decedent as of July 31, 1952, was \$11,500.00

III.

Assignments of Error

The Petitioner assigns as error the following acts and omissions of The Tax Court of the United States:

1. The Tax Court erred in its application of the law relating to the determination of fair market value of the growing crop.

2. The Tax Court erred in finding as an ultimate fact that the fair market value of the growing crop was \$11,500.00 at July 31, 1952.

3. The Tax Court erred in that its decision is not supported by the evidence and is contrary to law.

4. The Tax Court erred in holding and deciding that there was a deficiency in individual income taxes due from the petitioner in the amount of \$2,217.79 for the year 1951 and in the amount of \$8,532.14 for the year 1952.

Wherefore, the petitioner prays that the decision of The Tax Court of the United States be reviewed

by the United States Court of Appeals for the Ninth Circuit.

/s/ **JOHN L. FLYNN,**

Attorney for Petitioner on
Review.

Affidavit

State of Oregon,

County of Multnomah—ss.

Being first duly sworn, I depose and say that the Commissioner of Internal Revenue is the respondent in the within-entitled petition and that John Potts Barnes, former Chief Counsel of the Internal Revenue Service, was the attorney of record for the respondent in the within-entitled proceeding; that the said John Potts Barnes has resigned from the Internal Revenue Service; that Herman T. Reiling is presently Acting Chief Counsel of the Internal Revenue Service and is the attorney of record for the Commissioner of Internal Revenue; that the said Herman T. Reiling has an office in the Internal Revenue Building in Washington, D. C.; that between said place and Portland, Oregon, there is regular communication by mail; that on March 5, 1957, I served an original copy of the within Petitioner's Notice by Petitioner of Filing Petition for Review together with a true copy of the Petition for Review and Designation of Record upon the said attorney by depositing the same in the United States Postoffice at Portland, Oregon, en-

closed in a sealed envelope with postage prepaid thereon, addressed to him at the said address.

/s/ JOHN L. FLYNN,
Attorney for Petitioner.

Subscribed and sworn to before me this 5th day of March, 1957.

[Seal] /s/ MARY E. PEASE,
Notary Public for Oregon.

My commission expires: Aug. 13, 1959.

Duly verified.

Filed March 7, 1957. T.C.U.S.

[Title of Tax Court and Cause.]

CERTIFICATE

I, Howard P. Locke, Clerk of The Tax Court of the United States, do hereby certify that the foregoing documents, 1 to 11, inclusive, constitute and are all of the original papers on file in my office as called for by the "Designations of Contents of Record," including joint Exhibit 1-A, attached to stipulation of facts, and respondent's Exhibit B, admitted in evidence, in the case before The Tax Court of the United States docketed at the above number and in which the petitioner in The Tax Court case has filed a petition for review as above numbered and entitled, together with a true copy of the docket

entries in said Tax Court case, as the same appear in the official docket book in my office.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 15th day of March, 1957.

[Seal] /s/ HOWARD P. LOCKE,
Clerk, The Tax Court of the
United States.

[Endorsed]: No. 15503. United States Court of Appeals for the Ninth Circuit. Estate of Grace N. Williams, Deceased; Ralph E. Williams, Executor, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Petition to Review a Decision of The Tax Court of the United States.

Filed March 28, 1957.

Docketed April 1, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit
No. 15503

ESTATE OF GRACE N. WILLIAMS, Deceased;
RALPH E. WILLIAMS, Executor,
Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Appellee.

STATEMENT OF POINTS

In his appeal herein, the appellant intends to rely upon the following points:

1. The Tax Court erred in its application of the law relating to the determination of fair market value of the growing crop.

2. The Tax Court erred in finding as an ultimate fact that the fair market value of the growing crop was \$11,500.00 at July 31, 1952.

3. The Tax Court erred in that its decision is not supported by the evidence and is contrary to law.

4. The Tax Court erred in holding and deciding that there was a deficiency in individual income taxes due from the appellant in the amount of \$2,217.79 for the year 1951 and in the amount of \$8,532.14 for the year 1952.

/s/ JOHN L. FLYNN,

Attorney for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 2, 1957.

In the
United States Court of Appeals
For the Ninth Circuit

ESTATE OF GRACE N. WILLIAMS,

Deceased,

Ralph E. Williams, Executor, *Petitioner*,

v.

COMMISSIONER OF INTERNAL

REVENUE, *Respondent*.

NO. 15503

ON PETITION FOR REVIEW OF DECISION OF
THE TAX COURT OF THE UNITED STATES

CLARENCE P. Le MIRE, *Judge*

BRIEF FOR PETITIONER

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In the
United States Court of Appeals
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ESTATE OF GRACE N. WILLIAMS, Deceased,

Ralph E. Williams, Executor, *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

NO. 15503

BRIEF FOR PETITIONER

ON PETITION FOR REVIEW OF DECISION OF
THE TAX COURT OF THE UNITED STATES

STATEMENT OF JURISDICTION

The Petitioner is the duly qualified and acting Executor of the Estate of Grace N. Williams, deceased August 20, 1954, under letters testamentary issued by the Circuit Court of the State of Oregon for the County of Multnomah, Department of Probate, on September 29, 1954.

The individual income tax returns of Grace N. Williams, the decedent taxpayer, for the years 1951 and

1952, were filed with the United States District Director of Internal Revenue for the District of Oregon, whose office is located at Portland, Oregon, within the jurisdiction of the United States Court of Appeals for the Ninth Circuit. On February 3, 1955, the District Director determined a deficiency of income taxes against the Estate of the decedent taxpayer for the years 1951 and 1952, against which deficiency the Petitioner filed a timely petition with The Tax Court of the United States, which Court had jurisdiction of the controversy under 26 U.S.C. § 7442. The Tax Court, Clarence P. Le Mire, J., rendered a final decision adverse to Petitioner December 12, 1956, T. C. Memo. 1956-239.

Petitioner filed a timely notice of petition for review by this Court on March 7, 1957. The jurisdiction of this Court is invoked under 26 U.S.C. §§ 7482 and 7483.

STATUTES AND REGULATIONS

The relevant statutes and regulations are set forth in an appendix to this brief.

STATEMENT OF THE CASE

This controversy involves the determination of the decedent taxpayer's liability for federal individual income taxes for the calendar years 1951 and 1952. R. 112. The calendar year 1951 is here involved by reason

of the provisions of 26 U.S.C. § 23 (s), (I.R.C. 1939) relating to the carrying back of net losses against income of a prior year.

On March 1, 1951, Grace N. Williams (hereinafter called the decedent) exchanged all of the assets and liabilities of a farm owned and operated by her as an individual proprietor for the capital stock of Eola Farms, Inc., an Oregon corporation, R. 113.

During the period from March 1, 1951 until July 31, 1952, the decedent was the sole stockholder of Eola Hop Farms, Incorporated, an Oregon corporation, engaged in the business of hop farming in Marion County, Oregon, R. 31. On July 31, 1952, Eola Hop Farms, Incorporated, distributed to the decedent as a liquidating dividend all of its assets consisting of 165 acres of land of which 149.5 acres were planted to hops (R. 30, (Stip. 6)), together with all other assets of the corporation including the buildings and equipment necessary to operation of the farm, R. 30, 31, (Stip. 3).

The decedent reported receipts from sales of the 1952 hop crop in the amount of \$46,445.72 for the year 1952, (R. 31, R. 33 (Ex. 1-A)), and expenses applicable thereto of \$86,181.55. The latter sum was made up of \$44,165.66 claimed by the decedent as the value of the growing crop received in liquidation of the Eola Farms,

Inc. and the costs of harvesting and marketing the crop, \$42,015.89, R. 31.

The sole contested issue before The Tax Court was the fair market value of the crop of hops growing upon the lands distributed to the decedent by Eola Hop Farms, Incorporated, as of July 31, 1952, R. 36. The expenses incurred by the corporation during the period from January 1 to July 31, 1952, for the planting, care, and cultivation of the growing crop of hops amounted to \$44,165.66. This sum was carried on the balance sheet of the corporation as an asset (prepaid expense), at the time of distribution to the decedent, R. 25, (Ex. C), 31.

The hop industry had been suffering from serious overproduction since 1950. The market, for the most part of 1952, was relatively inactive. Under the Agriculture Market Agreement Act of 1937, the industry put into effect an agreement providing the industry with authority to bring supplies in balance with demand. The agreement was administered by a Hop Control Board made up of growers, dealers, brewers, and Government representatives. The Board met in the late summer of each year and made a survey of prospective demand and other factors which might affect market conditions. It determined what it considered to be the salable quantity of crop then planted — a quantity

which the trade could consume during the succeeding twelve month period — and recommended to the Secretary of Agriculture that the quantity of hops it estimated the brewing industry could use during the succeeding twelve-month period (after consideration of estimated exports and imports and a deduction for inventories on hand) be declared as the salable quantity from the current year's crop. In general, and during 1952, the Board's recommendation of salable quantity was adopted by the Secretary without substantial change, R. 115, 116.

The overall salable quantity of hops determined by the Secretary was expressed (after harvest) as the salable percentage of each grower's crop. The grower was not permitted to market more than such established percentage. It was however necessary for each grower to harvest all of his crop including the unsalable portion, R. 116.

The decision of the Secretary of Agriculture regarding the relationship of the salable quantity to the total crop was not made, nor was the surplus percentage of the particular crop established until every last bale of hops was weighed and the unharvested acreage determined by the Hop Control Board, R. 106. During the year 1952, a tentative allocation was made some time during October, R. 81. The final determination

was not made by the Secretary of Agriculture until approximately December 15, 1952, R. 107, 108.

Petitioner, Ralph E. Williams, had many years experience as a dealer in hops and as a grower, R. 39. He had actively managed the decedent's hop farm, Eola Farm, since 1940, (R. 53), and during the years here involved was a member of the Hop Control Board, R. 56.

The contention of the Petitioner before the Tax Court was that the fair market value of the growing crop distributed to the decedent was not determinable at July 31, 1952, and that the value of the growing crop was not less than the costs of production of the crop to the date of distribution; i.e. \$44,165.66.

The Respondent, Commissioner of Internal Revenue, determined the value of the growing crop at July 31, 1952, to be \$4,375.40, R. 37. The Respondent's determination was arrived at by deducting from the total farm revenues, the costs of operation of the farm from August 1 to December 31, 1952.

The Respondent's determination that the fair market value of the crop distributed to the decedent was \$4,375.40 instead of the sum of \$44,165.66 claimed by the decedent resulted in an increase in the taxable income of the decedent for the year 1952 of \$39,790.26

and the elimination of the loss carry-back claimed by the decedent against income of the calendar year 1951.

The Tax Court found as an ultimate fact that the fair market value of the growing crop distributed to the decedent as of July 31, 1952, was \$11,500.00.

QUESTION PRESENTED

Does the evidence require a finding that the growing crop distributed to the decedent taxpayer July 31, 1952, was worth not less than the costs of production to that date?

SPECIFICATIONS OF ERROR

The Tax Court's finding as an ultimate fact that the value of the growing crop at July 31, 1952, was \$11,500.00 is not supported by the evidence and is contrary to law.

The Tax Court did not apply the rule it properly held to be applicable to the determination of the value of the growing crop.

SUMMARY OF EVIDENCE

The testimony and evidence adduced at the trial was that the average yield of hops from land in the vicinity of the Eola Farm was from five to seven and

one-half bales (of 200 pounds each) to the acre, (R. 40, 65, 71, 77), and that an estimate of the yield per acre made at July 31 of any year could vary downward as much as 30%, (R. 66, 77), and that seldom did the actual yield exceed the estimate, R. 66.

The witnesses further testified: that, there was little or no risk of loss of the crop (in that area) from July 31 to date of harvest, (R. 44, 68); that, the average cost of production, cultivation, and care to that date was from 20 to 25 cents per pound, (R. 43, 65, 73); that, the average additional cost of harvest and sales subsequent to July 31 was from 20 to 25 cents per pound, R. 46, 72.

Beginning with July 1 of each year, the crop reporting service of the Department of Agriculture prepared a monthly estimate of the hop crop for the current year, which was released about the tenth of the following month, R. 106. This estimate was available to the trade in general, (R. 92), and was not a factor in the recommendation of the salable quantity of hops from the current crop as made by the Hop Control Board, (R. 57), whose function it was to estimate the demand for hops during the coming year and to establish a salable quantity from the current year's crop, R. 104, 105.

A comparison of the salable quantity of hops adopted by the Secretary of Agriculture to the current estimates of hop production made by the Crop Reporting Service would enable anyone to approximate the unsalable portion of the current hop crop (surplus percentage), assuming that the crop turned out as estimated, R. 105. The ratio of the salable quantity of hops to the total crop, (salable percentage), was dependent upon what the crop turned out to be, and could not be established until every last bale was weighed; the unharvested acreage estimated and the figures established, R. 104, 105.

At July 31, 1952, the total pounds from the current crop which could be consumed during the following year by the brewing industry (salable quantity) was known or could be reasonably approximated by the Petitioner (R. 58, 103, 104). During 1952, the proportion (salable percentage) that this quantity represented of the total current crop was not determined until approximately December 15, 1952 (R. 108) although notice of a tentative allotment was received some time during October, R. 79, 81.

During the 1951-52 crop year (September 1 to August 31), supplies of hops were well above market needs and domestic demand for hops was slow. During late 1952, the range in market prices for hops of the type

grown on the Eola Farm was from 49 to 52 cents per pound, R. 44, 88.

The Petitioner's crop could have been sold at July 31, 1952, at the prevailing bid prices but the Petitioner would not sell at the prices offered, R. 44, 46, 80.

For the year 1950, the salable percentage of each grower's crop was slightly in excess of 85 per cent of the crop as finally harvested and determined; for the year 1951, the salable percentage was approximately 74 per cent, R. 81, 82. During both years, a profit was earned from the sale of hops grown on the Eola Farm, R. 31, 114. A substantial loss was sustained upon sales of the 1952 crop. R. 31, 114. During the year 1952, the salable percentage of hops grown on the Eola Farm was 65.7 per cent, R. 81, 116. During this year, the dealers and the growers did not believe that the surplus percentage of the 1952 crop would be as much or as high as it was finally determined and anticipated that it would be at the most 25 per cent or even less than that, R. 88.

Lack of knowledge of the salable allotment prevented the placing of a market value upon the crop growing at July 31, 1952 (R. 52), although the Petitioner could estimate the allotment within reasonable bounds, R. 58, 105.

The Petitioner did not know at July 31, that a loss would be sustained upon sale of the 1952 crop (R. 61), nor was the anticipation of a substantial loss upon the sale of the 1952 crop a material factor in the decision to liquidate the corporation, R. 55, 56, 59.

The corporation (Eola Farms, Inc.) had no earned surplus at July 31, 1952, the date of dissolution and liquidation of the corporation. The corporation's capital had been impaired by a deficit at that date in the amount of \$8,285.34, R. 25 (Ex. C). The Petitioner was aware prior to liquidation of Eola Farms, Inc., that the decedent taxpayer could have obtained the total of the corporation's investment in the crop at July 31, 1952, as a deduction from ordinary income by means of a tax free liquidation, R. 62, 63; (I.R.C. (1939) § 112 (b) (7)).

ARGUMENT

I

THE DECISION OF THE TAX COURT IS NOT SUPPORTED BY THE EVIDENCE.

In its opinion, the Court stated the rule that in dealing with special property which admits of no accurate determination, recognition is given to the rule of reasonableness and common sense, and that facts of probative force serve to fix value, R. 118.

The Court's finding as an ultimate fact that the value of the crop distributed to the decedent taxpayer at July 31, 1952, was \$11,500.00 (R. 119), must have been based upon the following calculation, or a calculation substantially similar thereto:

Market price bid at July 31, applied to approximately $\frac{2}{3}$ of crop, (harvested, 52,740 pounds): 100,000 pounds @ 49 cents.....	\$49,000.00
Cost of harvesting 150,000 pounds @ 25 cents.....	37,500.00
Value of crop.....	<hr/> \$11,500.00

Implicit in the Court's determination of the fair market value of the growing crop distributed to the decedent taxpayer at July 31, is the finding that on July 31, 1952, it was known that not less than one-third of the crop could not be sold.

The preceding calculation is understandable in view of the Court's finding as a fact that Ralph E. Williams, Jr. participated in the deliberations of the Board on July 17, 1952, at which time the Board recommended that approximately 36 per cent of the crop be declared non-salable, R. 117. This finding was in error because the Tax Court misunderstood the function of the Hop Control Board, and confused the salable quantity

recommended by the Hop Control Board during July with the salable percentage of crop determined some three to five months later by the Secretary of Agriculture.

The evidence is clear that the Hop Control Board did not recommend the salable percentage of the total crop, R. 57, 104, 105. Its sole function was to estimate the quantity of hops the brewing industry could consume and to recommend to the Department of Agriculture that sales of hops from the current crop be limited to that quantity, R. 103, 105. The Board recommended that the salable quantity of the 1952 crop of hops be fixed at 39,200,000 pounds. The basis of the Board's recommendation is fully set forth in a notice of a proposed administrative rule published in the Federal Register, August 7, 1952, Vol. 17 F.R. 7187, a copy of which is included in the appendix hereto.

Respondent's witness testified that beginning with July 1, of each year, the crop reporting service of the Department of Agriculture prepared a monthly estimate of the hop crop for the current year which estimate was released about the tenth day of the month following, R. 106. This report was not confidential; it was available not only to the Hop Control Board but to the trade in general, R. 92.

Not only did the Petitioner testify that the Department of Agriculture's estimate of the 1952 crop "did not constitute any element whatsoever" in the determination of the salable quantity of hops recommended by the Board as the pounds the brewing industry could be expected to consume, (R. 57), but Respondent's own witness so testified, R. 104, 105.

In view of the testimony in this proceeding that an estimate of crop made at July 31 might vary as much as 30% (R. 66), or as much as from one to two bales per acre, (R. 78), it is readily apparent that an estimate made one month earlier at July 1, (published about July 10, (R. 106)), would be of little or no value for the purpose of determining the relationship between the quantity of hops the industry could be expected to consume to the total crop yield for the current year.

The testimony of the Respondent's witness in this proceeding is also equally clear that the ratio of the salable quantity of hops recommended by the Hop Control Board and the proportion that quantity represented of the total crop could not be determined until every last bale of hops was processed and baled and the acreage of unharvested crops estimated, R. 105, 106.

There was therefore no basis in the evidence or the testimony for the finding of the Tax Court that the Hop

Control Board recommended or determined that 36 per cent of the 1952 crop would not be sold, and it was error for the Court to give effect to a reduction of more than $\frac{1}{3}$ in determining the sales value of the crop.

The Court's finding of a market price of 49 cents per pound is in error because, the "fair market" price or value at a particular time is to be determined from all of the circumstances. The testimony is uncontradicted that 49 cents was the lowest price bid for hops at July 31, 1952, R. 44, 88, and that there were few sales, R. 62. The fact of sales in itself does not conclusively establish either fair market price or value. The ascertainment of value requires that there must be not simply a market price but a *fair* market price, and opinions of intelligent men experienced in the business are admissible to show fair value, *Heiner v. Crosby*, 24 F. 2d. 191. (C.A. 3, 1928)

The Court's finding that the growing crop was worth \$11,500.00 and not \$44,165.66 involves hindsight in that it assumes that the exact yield and that the portion of the growing crop to be determined as surplus were known at July 31, 1952; it has the effect of making certain what was at that date pure speculation.

THE COURT COULD NOT REJECT THE TESTIMONY OF WITNESSES HAVING EXPERIENCE AND KNOWLEDGE OF THE SUBJECT MATTER WHERE THE TESTIMONY WAS NOT CONTRADICTED.

The Court refused to accept the Petitioner's contention that the fair market value of the growing crop distributed to the decedent taxpayer at July 31, 1952, was not less than the costs of production, cultivation, and care to that date, R. 118.

The uncontradicted testimony was that the expected yield was from 5 to 7½ bales per acre (approximately 150,000 to 225,000 pounds) (R. 40, 65, 71, 77); that the market (bid) price for hops at July 31, 1952, was from 49 to 52 cents per pound, (R. 46, 88); that the cost of harvesting was from 20 to 25 cents per pound, (R. 46, 72); that the hops could have been sold for the prices bid at July 31, (R. 44, 88), and that the Petitioner did not anticipate a loss upon the sale of the crop, R. 61.

The Petitioner, Ralph E. Williams, managed the decedent taxpayer's farm (R. 44), and was qualified by experience and training as well as by knowledge to testify to the value of the crop and to the probable market therefor. He stated that lack of knowledge at July 31, 1952, of the salable percentage of the crop

prevented the placing of a market value upon the crop (R. 52), and that the crop could have been sold (R. 46), but he would not have sold at the prices bid, R. 52. The witness also testified that counsel for the decedent taxpayer participated in the decision to liquidate the corporation (R. 55), and that he was informed and was aware that the taxpayer could have obtained the corporation's cost of the crop as a deduction from ordinary income of the taxpayer (by election to liquidate under the provisions of the Internal Revenue Code (1939) 112 (b) (7)), R. 62, 63. It appears obvious that had the crop been of little value, the corporation would have been liquidated in this manner if for no other reason than to avoid controversy regarding the value of the crop and denial of any loss resulting from a valuation at less than the sum of \$44,165.66 expended for production and care of the crop to July 31, 1952.

Frank Kennedy, a disinterested witness with thirty-five years experience in the growing of hops on a farm adjacent to the Eola Farm, testified the average yield of hops grown on farms in the area was from 5 to 7 bales to the acre and that the costs of production were from 20 to 25 cents per pound, R. 65, 66. He also testified that he was familiar with the crops growing on the Eola Farm and that as a grower of hops he would not sell the growing crop at July thirty-first of any year

for less than the cost of production. He further testified that he would not have sold a growing crop of hops on July 31, 1952, for thirty cents per pound, assuming the market price was fifty cents per pound on that date for delivery of the hops after harvest, R. 67.

Since a bid of fifty cents per pound for hops at July 31, 1952, would, after deduction of the average costs of picking and harvesting, yield a return equal to the average costs of production, cultivation, and care of the crop to that date only if the entire crop were sold, it is apparent that a statement that the grower of hops would not sell his crop for less than the cost of production meant that he would not sell his crop for less than the cost of production of the *entire crop*; the statement did not mean that he would not sell his crop for the cost of production of that portion of the crop determined salable at a later date.

C. W. Paulus, an experienced dealer in hops since 1933, was familiar with the 1952 crop during its period of growth on the Eola Farm, (R. 76); he also testified (as a broker) that he could have sold that crop at July 31 and that the Petitioner would not sell.

The witnesses were qualified to testify to the value of the property by reason of their experience and dealings in the property and their knowledge of similar

property. None of the preceding testimony was contradicted, discredited or impeached.

In a question involving the amount of entertainment expenses claimed as a deduction by an actor, *Blackmer v. Commissioner*, 70 F.2d 255, 257 (C.A. 2, 1934), and a question regarding the valuation of property owned by a corporation of which the witness was the President, *A & A Tool & Supply Company v. Commissioner*, 182 F.2d 300, 304 (C.A. 10, 1950), the Court of Appeals held that the Tax Court may not arbitrarily discredit and disregard unimpeached, competent and relevant testimony which is uncontradicted.

III

THE COURT DID NOT APPLY THE RULE FOR THE DETERMINATION OF VALUE OF THE GROWING CROP SET FORTH IN ITS OPINION.

The Court's determination that the growing crop was worth \$11,500.00 at July 31, 1952 violates that portion of the Court's statement of the rule relating to reasonableness and common sense (R. 118), because there is no evidence that any reasonable grower would at July 31, assuming the facts existing in this case, sell his crop based upon an estimate of the *minimum* yield and *maximum* harvest costs and subject to a further

reduction much greater than anything in his past experience. There is substantial evidence to the contrary, R. 48, 67, 80. The testimony and evidence in this case does not support the Court's decision.

CONCLUSION

The judgment of the Tax Court should be reversed and the case remanded for a new trial with instructions that all of the oral evidence be considered and appropriately weighed because the conclusions of the Court upon which the judgment is based can be sustained only by giving effect at July 31 to knowledge obtainable from three to five months later.

Respectfully submitted,

JOHN L. FLYNN,

BURTON L. COAN,

Attorneys for Appellant.

APPENDIX**STATUTES AND REGULATIONS INVOLVED**

Internal Revenue Code (1939):

Section 111. Determination of amount of, and recognition of, gain or loss:

(a) Computation of gain or loss. The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 113 (b) for determining gain, and the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized.

(b) Amount realized. The amount realized from the sale or other disposition of property shall be the sum of any money received plus the fair market value of the property (other than money) received.

(c) Recognition of gain or loss. In the case of a sale or exchange, the extent to which the gain or loss determined under this section shall be recognized for the purposes of this chapter, shall be determined under the provisions of section 112. * * * * *

Regulations 118:

Section 39. 111-1 Computation of gain or loss.

(a) Except as otherwise provided, the Internal Revenue Code regards as income or as loss sustained, the gain or loss realized from the conversion of property into cash, or from the exchange of property for other property differing materially either in kind or in extent. The amount realized from a sale or other disposition of property is the sum of any money received plus the fair market value of any property which is received. The fair market value of property is a question of fact, but only in rare and extraordinary cases will property be considered to have no fair market value. * * * * *

Section 112. Recognition of Gain or Loss.

(a) General Rule.—Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 111, shall be recognized, except as hereinafter provided in this section.

(b) Exchanges Solely in Kind.—

* * * * *

(7) Election as to recognition of gain in certain corporate liquidations.—

(A) General rule.—In the case of property distributed in complete liquidation of a domestic corporation, if—

(i) the liquidation is made in pursuance of a plan of liquidation adopted after December 31, 1950,

whether the taxable year of the corporation began on, before, or after January 1, 1951; and

(ii) the distribution is in complete cancellation or redemption of all the stock, and the transfer of all the property under the liquidation occurs within some one calendar month in 1951, 1952, or 1953—then in the case of each qualified electing shareholder (as defined in subparagraph (C) gain upon the shares owned by him at the time of the adoption of the plan of liquidation shall be recognized only to the extent provided in subparagraphs (E) and (F).

* * * * *

(C) Qualified electing shareholders.—The term “qualified electing shareholder” means a shareholder (other than an excluded corporation) of any class of stock (whether or not entitled to vote on the adoption of the plan of liquidation) who is a shareholder at the time of the adoption of such plan, and whose written election to have the benefits of subparagraph (A) has been made and filed in accordance with subparagraph (D), but—

* * * * *

(E) Noncorporate shareholders. In the case of a qualified electing shareholder other than a corporation—

(i) There shall be recognized, and taxed as a dividend, so much of the gain as is not in excess of his ratable share of the earnings and profits of the corporation accumulated after February 28, 1913, such earnings and profits to be determined as of the close of the month in which the transfer in liquidation occurred under subparagraph (A) (ii), but without diminution by reason of distributions made during such month; but by including in the computation thereof all amounts accrued up to the date on which the transfer of all the property under the liquidation is completed; and

(ii) There shall be recognized, and taxed as short-term or long-term capital gain, as the case may be, so much of the remainder of the gain as is not in excess of the amount by which the value of that portion of the assets received by him which consists of money, or of stock or securities acquired by the corporation after August 15, 1950, exceeds his ratable share of such earnings and profits.

* * * * *

Thursday, August 7, 1952

7187

FEDERAL REGISTER

PROPOSED RULE MAKING

DEPARTMENT OF AGRICULTURE

Production and Marketing Administration

[7 CFR Part 986]

HOPS GROWN IN OREGON, CALIFORNIA, WASHINGTON,
AND IDAHO, AND HOP PRODUCTS PRODUCED THERE-
FROM IN THESE STATES

SALABLE QUANTITY OF 1952 CROP HOPS

Notice is hereby given that the Department is considering the issuance of the proposed administrative rule herein set forth pursuant to provisions of Marketing Agreement No. 107, as amended, and Order No. 86, as amended, regulating the handling of hops grown in Oregon, California, Washington, and Idaho, and of hop products produced therefrom in these States (17 F.R. 6626), effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601 et seq.).

Prior to the issuance of such administrative rule consideration will be given to any data, views, or arguments pertaining thereto which are submitted in writing to the Director, Fruit and Vegetable Branch, Production and Marketing Administration, U.S. Department of Agriculture, Washington, D. C., and which are received not later than the close of business on the tenth day after the date of publication of this notice in the FEDERAL REGISTER, except that, if such tenth day after publication should fall on a holiday, Saturday, or Sunday, such submission may be received by the Director not later than the close of business on the next following work day.

Pursuant to provisions of the aforesaid amended agreement and amended order the Hop Control Board, the administrative agency thereunder, has transmitted to the Secretary of Agriculture its estimates relating to hop stocks and consumptive demand for hops, and has recommended that the salable quantity of 1952 crop hops be fixed at 39,200,000.

In arriving at the salable quantity which it has recommended the Board estimated consumptive demand for the 12 months beginning September 1, 1952, at 45,905,000 pounds, comprised of domestic usage for brewing, 35,805,000 pounds, other domestic usage, 600,000 pounds, and exports, 9,500,000 pounds. It estimated that hop stocks would decrease by 3,000,000 pounds during the period and that 1952 production in areas outside of the production area would be 105,000 pounds. The Board estimated that imports during the 12 months beginning September 1, 1952, would be 3,600,000 pounds which, subtracted from its estimate of consumptive demand, as adjusted for the estimated decrease in hop stocks and 1952 production outside of the production area, results in a quantity of 39,200,00 pounds, the salable quantity which the board recommends be supplied from 1952 crop hops produced in the production area.

On the basis of the foregoing data and of other pertinent data of hop supplies and usage, it is proposed to accept the Board's recommendation of the salable quantity of 1952 crop hops.

Therefore, such proposed administrative rule is as follows:

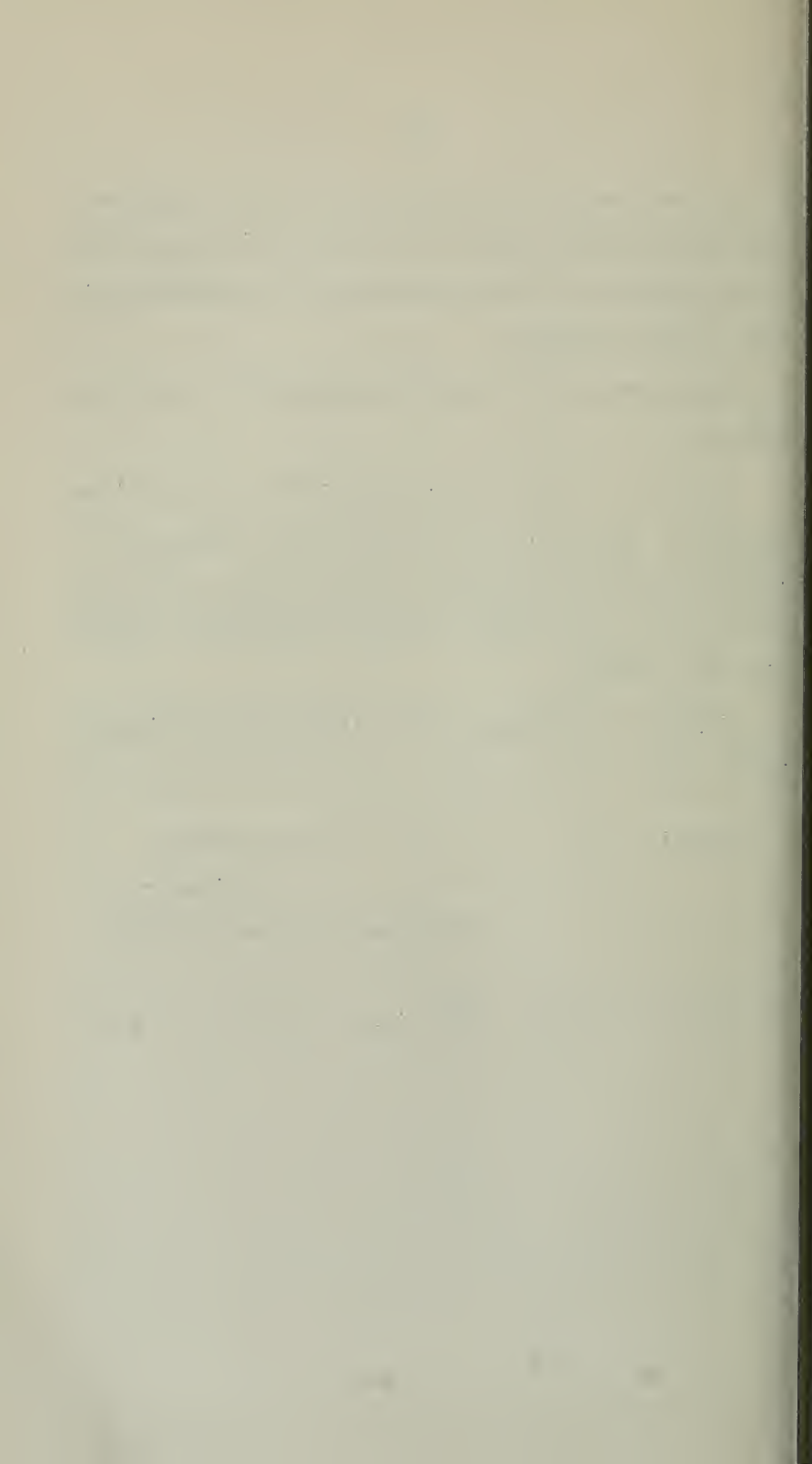
§ 986.204 *Salable quantity of 1952 crop hops.* The maximum quantity of hops produced during 1952 which may be handled in the form of hops and in the form of any hop product shall be 39,200,000 pounds (net dry weight).

Issued at Washington, D. C., this 1st day of August 1952.

[SEAL]

S. R. SMITH,
Director,
Fruit and Vegetable Branch.

[F. R. Doc. 52-8722: Filed, Aug. 6, 1952; 8:57 a.m.]



No. 15503

In the United States Court of Appeals
for the Ninth Circuit

ESTATE OF GRACE N. WILLIAMS, DECEASED, RALPH
E. WILLIAMS, EXECUTOR, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

On Petition for Review of the Decision of the
Tax Court of the United States

BRIEF FOR THE RESPONDENT

CHARLES K. RICE,
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**In the United States Court of Appeals
for the Ninth Circuit**

No. 15503

ESTATE OF GRACE N. WILLIAMS, DECEASED, RALPH
E. WILLIAMS, EXECUTOR, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

**On Petition for Review of the Decision of the
Tax Court of the United States**

BRIEF FOR THE RESPONDENT

OPINION BELOW

The memorandum findings of fact and opinion of the Tax Court (R. 112-119) are not officially reported.

JURISDICTION

This petition for review (R. 121-126) involves federal income taxes for the taxable years 1951 and 1952 (R. 112). The Commissioner mailed to taxpayer on February 3, 1955 (R. 26), a notice of deficiency in income taxes in the amount of \$2,806.69 for 1951 and in the amount of \$13,060.19 for 1952

(R. 17). Taxpayer filed a timely petition for redetermination with the Tax Court under the provisions of Section 272(a)(1) Internal Revenue Code of 1939. (R. 3, 5, 25.) The decision of the Tax Court was entered on December 12, 1956. (R. 120.) A timely petition for review by this Court was filed on March 7, 1957. (R. 4.) Jurisdiction is conferred on this Court by Section 7482, Internal Revenue Code of 1954.

QUESTION PRESENTED

Whether the record supports the finding of the Tax Court that the fair market value of the growing hops involved was \$11,500 on July 31, 1952, on which date taxpayer acquired the hops as a liquidating dividend?

STATUTES AND REGULATIONS

Internal Revenue Code of 1939:

SEC. 111. DETERMINATION OF AMOUNT OF, AND RECOGNITION OF, GAIN OR LOSS.

(a) *Computation of Gain or Loss.*—The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 113 (b) for determining gain, and the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized.

(b) *Amount Realized.*—The amount realized from the sale or other disposition of property shall be the sum of any money received plus

the fair market value of the property (other than money) received.

(c) *Recognition of Gain or Loss.*—In the case of a sale or exchange, the extent to which the gain or loss determined under this section shall be recognized for the purposes of this chapter, shall be determined under the provisions of section 112.

* * * *

(26 U.S.C. 1952 ed., Sec. 111.)

SEC. 112. RECOGNITION OF GAIN OR LOSS.

(a) *General Rule.*—Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 111, shall be recognized, except as hereinafter provided in this section.

* * * *

(26 U.S.C. 1952 ed., Sec. 112.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

Sec. 29.111-1. *Computation of Gain or Loss.*
—Except as otherwise provided, the Internal Revenue Code regards as income or as loss sustained, the gain or loss realized from the conversion of property into cash, or from the exchange of property for other property differing materially either in kind or in extent. The amount realized from a sale or other disposition of property is the sum of any money received plus the fair market value of any property which is received. The fair market value of property is a question of fact, but only in rare and extraordinary cases will property be considered to have no fair market value. * * *

Treasury Regulations 118, promulgated under the Internal Revenue Code of 1939:

Sec. 39.111-1 *Computation of gain or loss.*

(a) Except as otherwise provided, the Internal Revenue Code regards as income or as loss sustained, the gain or loss realized from the conversion of property into cash, or from the exchange of property for other property differing materially either in kind or in extent. The amount realized from a sale or other disposition of property is the sum of any money received plus the fair market value of any property which is received. The fair market value of property is a question of fact, but only in rare and extraordinary cases will property be considered to have no fair market value. * * *

Sec. 39.112 (a)-1 *Sales or exchanges.* (a)

The extent to which the amount of gain or loss, determined under section 111, from the sale or exchange of property is to be recognized is governed by the provisions of section 112. The general rule is that the entire amount of such gain or loss is to be recognized.

* * * *

STATEMENT

The facts as found by the Tax Court, some of which were stipulated, may be summarized as follows:

Prior to 1950, the Eola Hop Farms located in Marion County, Oregon, had been owned and operated by Grace N. Williams (hereinafter referred to as the decedent) and a co-partner, under the part-

nership name of Williams and Thacker. Of its approximately 165 acres, 149.5 acres were planted to hops. In 1950, the interest of the co-partner was purchased by the decedent and thereafter until March 1, 1951, decedent operated the business as a sole proprietorship. On March 1, 1951, all of the assets and liabilities of the sole proprietorship were transferred by decedent to Eola Hop Farms, Inc., a corporation, in exchange for all of the capital stock of the corporation. From March 1, 1951, to July 31, 1952, the farming business was carried on by the corporation. Thereafter, farming operations were carried on by decedent as a sole proprietorship. In 1953, the hop vines were pulled up and the growing of hops abandoned. (R. 112-113.)

The receipts from the sale of hops for the years 1950, 1951 and 1952 and the expenses incurred attributable to such receipts are as follows:

Year	Reported Hop Receipts	Reported Expenses
1950.....	\$108,246.42	\$85,820.81
1951.....	88,506.31	82,826.96
1952.....	46,445.72	86,181.55

The total crop production for 1952, in terms of pounds, the salable quantity of the crop, the amounts sold, and the unit price per pound received and the total receipts for the 1952 hops are shown by the following (R. 114):

1952 Crop Hops

Total crop—per Hop Control Board.....	152,740 pounds
Salable percentage	<u>65.7 %</u>
Salable allotment.....	100,350 pounds

Sales	Bales	Pounds	Price	Amount
Jos. Schlitz Brewing Co.....	246	48,716	52¢	\$25,332.32
Hans Hinrichs Hops Co., Inc.	32	7,643	67¢	5,120.81
Paul Reinemann Co.....	1	228	42¢	95.76
Paul Reinemann Co.....	13	2,399	42¢	1,007.58
Yakima Chief Ranches, Inc..	226	45,697	34¢	15,536.98
	518	104,683		\$47,093.45
Certificate purchase		2,399	27¢	647.73
	518	102,284		\$46,445.72

No contracts for the sale of the 1952 hop crop to dealers or users or any other persons had been executed by either the corporation or the decedent as of July 31, 1952. (R. 114.)

The average cost of planting and cultivating on lands in the vicinity of the Eola Farms during the year 1952 was from 22 to 25 cents per pound and the average cost of harvesting and baling was from 20 to 25 cents per pound. (R. 115.)

The growing crop of hops distributed to the decedent was not matured on July 31, 1952, and the risk of loss from mildew and other crop diseases was practically non-existent at that date. The crop matured during the latter part of August and the early part of September of 1952. (R. 115.)

The average market price for the type of hops grown on the Eola Farms as of July 31, 1952, was between 49 and 52 cents per pound. In the latter part of August the price range was between 30 and 35 cents per pound. In the middle of October the market became more active and through November ranged from 45 to 50 cents per pound and during December the price ranged from 50 to 53 cents per pound. (R. 115.)

The hop industry has been suffering from serious overproduction since 1950. The market, for the most part of 1952, was relatively inactive. Under the Agriculture Market Agreement Act of 1937, the industry put into effect an agreement providing the industry with authority to bring supplies in balance with demand. The agreement was administered by a Hop Control Board made up of growers, dealers, brewers and Government representatives. The Board met in the late summer of each year and made a survey of prospective demands and other factors which might effect market conditions. It determined what they considered to be the salable quantity of crop then planted—a quantity which the trade could consume and which would reflect a fair return to the grower. The Board made a recommendation as to salable quantity which was transmitted to the Secretary of Agriculture for final decision. The Secretary considered the recommendation of the Board, along with other pertinent data, and issued a final salable quantity. In general, the Board's recommendation as to the salable quantity was adopted by the Secretary without substantial change. In the year 1952, the Board's recommendation did not vary more than one or two per cent from the final decision made by the Secretary of Agriculture. (R.115-116).

The overall salable quantity for the hop industry determined by the Secretary was a percentage of each growers' crop and the growers could not market more than such established percentage. Nevertheless, it was necessary for each grower to harvest

all his crop, including the unsalable portion. (R. 116).

The salable percentage of each grower's crop was slightly in excess of 85 per cent in 1950; approximately 74 per cent in 1951; and in 1952 it was 65.7 per cent. (R. 116.)

The Hop Control Board met on July 17, 1952, and made its recommendation to the Secretary of Agriculture as to the salable quantity of the crop for that year. (R. 116-117.)

R. E. Williams, Jr., a son of decedent and executor of her estate, had long been active as a grower and dealer in hops. He was a member of the Hop Control Board and in 1952 he participated in its deliberations which resulted in recommending that approximately 36 per cent of the crop be declared non-salable. Williams managed the Eola Farms in 1952 and had managed it since 1940. He handled the decedent's hop growing affairs in 1952 and for a considerable time prior thereto. He also participated in the decision to dissolve the corporation on July 31, 1952. (R. 117.)

The Eola Hop Farms corporation reported a loss of \$8,597.33 for its operations for the period from March 1, 1951, to December 31, 1951. For the seven months ending July 31, 1952, a loss was reported by the corporation in the amount of \$339.12; however, in the computation of such loss the expenses incurred by the corporation in planting hops in March and caring for the 1952 crop up to July 31, 1952, were not deducted but were carried on the balance sheet of the corporation as an asset in the amount of \$44,165.66. This sum was carried over

and utilized by the decedent in computing the loss attributable to the 1952 hop crop. In addition to the above expenses incurred by the corporation, the decedent, operating as a sole proprietor after July 31, 1952, incurred further harvesting and marketing expenses attributable to the hop crop in the amount of \$42,015.89. (R. 113.)

The net income reported by decedent for the year 1950 was \$36,241.51; for the year 1951, \$30,344.40. In her federal income tax return for 1952, decedent reported a net farm loss of \$43,385.90 on the operation at the Eola Farms. When this loss was offset against her other income, the result, as reported on her tax return, was a net loss of \$8,731.03. (R. 114-115.)

In computing the loss upon liquidation of the Eola Hop Farms corporation and the operating loss for 1952 (R. 20-22), the Commissioner determined that the fair market value of the crop as of July 31, 1952, was \$4,375.40. This amount was determined by deducting the total cost of the operations of the farm for the period August 1, 1952, to December 31, 1952, from the total farm revenue for the year 1952. (R. 118.) The Tax Court made the factual finding that the fair market value of the hop crop as of July 31, 1952, was \$11,500. (R. 117, 119.)

SUMMARY OF ARGUMENT

The question to be determined by this Court is whether the Tax Court's finding of the fair market value of growing hops on July 31, 1952, is clearly erroneous. This Court has consistently stated that

findings of value are purely questions of fact and that the decision of the Tax Court will not be set aside unless the decision is clearly erroneous. In arriving at its determination, the Tax Court considered the maturity of the crop, the risk of loss, the estimated yield, the market price of similar hops, the cost of harvesting, the salable quantity as restricted by the industry agreement, the special knowledge of buyers in the industry and expert testimony. These factors were correctly considered by the Tax Court in determining fair market value and there is ample evidence of record so that the Tax Court's finding cannot be said to be clearly erroneous.

ARGUMENT

The Record Fully Supports the Tax Court's Finding That the Fair Market Value of the Growing Hops Involved Was \$11,500 On the Critical Date of July 31, 1952

Section 111, Internal Revenue Code of 1939, *supra*, provides for the determination of the amount of gain or loss in the case of a sale or exchange. Gain or loss is computed after determining the amount realized from the sale or exchange and the amount realized includes cash and the fair market value of property received. Section 111(a) and (b). The decedent here received property, i.e., the growing hops, as a liquidating dividend on July 31, 1952, in the exchange in question. (R. 117.) To determine the amount realized—in order to compute the loss resulting from the exchange here (R. 21-22)—the fair market value of the hops must be ascertained. Section 111(b). Whether the fair market value of the

hops as determined by the Tax Court is clearly erroneous is the sole issue here. (R. 112.)

It is well settled that "fair market value" is the price at which property would change hands between a willing buyer and a willing seller neither being under any compulsion to buy or sell. *Elmhurst Cemetery Co. v. Commissioner*, 300 U.S. 37, 39; *Olson v. United States*, 292 U.S. 246, 257. The question of fair market value is one of fact. *Simons Brick Co. v. Commissioner*, 45 F. 2d 57 (C.A. 9th), certiorari denied, 283 U.S. 834; *Commissioner v. Moore*, 207 F. 2d 265 (C.A. 9th). No single criterion is decisive but all relevant factors are considered. *Olson v. United States*, *supra*; *Penn v. Commissioner*, 219 F. 2d 18 (C.A. 9th). As this Court very recently stated (*Penn v. Commissioner*, *supra*, pp. 20-21):

The matter [of fair market value] is pure fact. The court has heard the evidence, considered the stipulated facts and exhibits and arrived at the value. There is no question upon which all persons, reasonable or otherwise, are so apt to differ as upon a question of value. It makes little difference whether the facts agreed upon or stipulated are in writing or by oral testimony. The duty of finding the facts is placed upon that court. When found, such facts are binding upon the appellate courts.

This is far from saying that the appellate court should refuse to recognize its responsibility to set aside a finding which is "clearly erroneous," especially when a firm conviction is arrived at that, considering the whole record, a

mistake has been committed. But the appellate court should never make the error of substituting its own judgment of the record as a whole for that of the findings of the tribunal primarily charged with the responsibility. It is a subtle difference, but a real one.

* * * *

If improper weight may have been given to these elements of evaluation but the conclusion was not demonstrably wrong, an appellate court should not interfere. Congress has committed questions such as valuation to the Tax Court. * * *

Accordingly, respondent need only point out here the ample facts of record which support the Tax Court's finding.

The hop crop involved was planted in March of 1952. (R. 113.) It did not mature until the latter part of August and the early part of September, 1952. (R. 115.) Although on the critical date, July 31, 1952, the crop was not matured, the risk of loss from mildew and other diseases was practically nil so that the yield could be estimated. Especially significant concerning value is that, as of the critical date, no contract had been consummated for the sale of this crop. (R. 114, 118.)

Since 1950, the hop industry had been suffering from serious overproduction. For the most part of 1952, the market was relatively inactive. In order to bring supplies in balance with demand, the industry had in effect an agreement under the Agriculture Market Agreement Act of 1937. The agreement was administered by the Hop Control Board.

During the summer of each year, the Board made a survey of prospective demand and other factors which might affect market conditions. It determined the salable quantity of crops then planted and made a recommendation of salable quantity to the Secretary of Agriculture. In 1952, the Board made its recommendation to the Secretary on July 17. Usually, the Board's recommendation was adopted by the Secretary without substantial change; but the Secretary issued the final salable quantity. In 1952, the Board's recommendation was the same as that finally adopted.¹ (R. 105, 115-117.)

The industry's agreement limited each grower's salable crop to the percentage established by the Secretary. The grower could not market more than the established percentage although it was necessary to harvest all his crop. The salable percentage of each grower's crop was approximately 74 per cent in 1951 and 65.7 per cent in 1952. (R. 116.) Thus, approximately 35 per cent of decedent's crop involved was unsalable.

It was well known by the growers and users of hops that the Hop Control Board's recommendation did not vary much from the Secretary of Agriculture's final decision of salable quantity. (R. 119.) As stated, the Board had deliberated and made its

¹ The Tax Court found that the Hop Control Board's recommendation for 1952 did not vary by more than one or two per cent from the Secretary's final decision (R. 116); but the determination which appears in the appendix to taxpayers' brief (pp. 24-27) shows that the Board's recommendation of salable quantity and the decision by the Secretary were identical (R. 105).

recommendation on July 17 for the year involved, 1952. (R. 116.) Obviously this was two weeks prior to July 31, 1952, which is the critical date here. In addition, decedent's son had special knowledge of market conditions during the time in question. Not only was he an experienced grower and dealer in hops but he was a member of the Hop Control Board, he participated in its deliberations during 1952 and he knew no later than July 17, 1952, that as a result of the Board's recommendation, approximately 35 per cent of the crop involved probably would be declared unsalable. (R. 57-58.) Thus, in view of the special knowledge of the growers and users of hops, manifestly salable quantity would obviously be an important factor in determining value on July 31, 1952.

The average market price for the type of hops involved as of the critical date, July 31, 1952, was between 49 and 52 cents per pound. In late August, when the hops involved matured, the price range was between 30 and 35 cents per pound.² From the

² It might be pointed out that even in taxpayer's calculation (Br. 12), the market price of 49 cents is used despite the immaturity of the hops as of July 31, 1952. If the lower price range of 30 to 35 cents per pound was used, which would seem warranted since the hops did not mature until late August and early September (R. 115), a lower valuation, based upon market price, would result. Furthermore, the actual average price received was less than 49 cents per pound; it was 47.4 per pound, *excluding* the low sale price on the certificate purchase. Finally, the actual expense of harvesting and baling was 27.6 cents per pound (R. 113, 114), while 25 cents per pound is used in taxpayer's calculation (Br. 12).

middle of October through November the price range was between 45 and 50 cents per pound and during December the price range was between 50 and 53 cents per pound. (R. 115.)

Clearly, the evidence outlined above amply supports the Tax Court's finding that the fair market value of the hops as of July 31, 1952, was \$11,500 and we submit that such finding is not clearly erroneous. The Tax Court properly considered the maturity of the crop, the risk of loss, the estimated yield, the market price of similar hops, the cost of harvesting the matured crop, the salable quantity as restricted by the industry agreement, the special knowledge of buyers in the industry, and expert testimony. That these factors were appropriately taken into account is well established as confirmed by the Supreme Court in its statement in *Olson v. United States*, *supra*, p. 257:

In making that estimate [of market value] there should be taken into account all considerations that fairly might be brought forward and reasonably be given substantial weight in such bargaining [negotiations to determine fair sale price]. (Citation omitted.) The determination is to be made in the light of all facts affecting the market value that are shown by the evidence taken in connection with those of such general notoriety as not to require proof. * * *

See also 10A Mertens, Law of Federal Income Taxation, Section 59.03 (1948 Rev. ed.); 2 Bonbright, Valuation of Property, pp. 1015-1018.

Of course, as this Court has stated in *Bank of California v. Commissioner*, 133 F. 2d 428, 432, the

weight to be given to various valuation factors is for the Tax Court to decide. *Elmhurst Cemetery Co. v. Commissioner*, *supra*, p. 40. It is the function of that tribunal to draw inferences, to weigh the evidence and declare the result. *Penn v. Commissioner*, *supra*, p. 20; *Elmhurst Cemetery Co. v. Commissioner*, *supra*, p. 40; *Helvering v. National Grocery Co.*, 304 U.S. 282, 295. Although taxpayer complains that the Tax Court did not accept its "expert" testimony (Br. 16-19), that tribunal is not obliged to accept as sound and blindly follow the opinion of any expert witness. *Penn v. Commissioner*, *supra*, p. 21; *Helvering v. National Grocery Co.*, *supra*, p. 295; *Gloyd v. Commissioner*, 63 F. 2d 649, certiorari denied, 290 U.S. 633. To be bound, as taxpayer seemingly contends, would amount to the Tax Court's abdicating its function, namely, to find the facts. The Tax Court finds the facts—not the experts. *Gloyd v. Commissioner*, *supra*. Taxpayer only offered two experts, considering the evidence most favorably for taxpayer. One of these was an interested expert, the decedent's son who had managed the farm for many years. (R. 117.) Besides, the "expert opinion" offered was to the effect that such experts would not have sold the hops on the date involved for less than the cost of production (R. 47-48, 67), but the cost of production is only one factor in determining fair market value and, as the Supreme Court has stated (*Brooks-Scanlon Corp. v. United States*, 265 U.S. 106, 123) :

The value of property may be greater or less than its cost; and this is true of contract rights

and other intangibles as well as of physical things. * * *

To be sure, the Tax Court cannot arbitrarily reject expert testimony. *Boggs & Buhl, Inc. v. Commissioner*, 34 F. 2d 859 (C.A. 3d); *Clinton Cotton Mills v. Commissioner*, 78 F. 2d 292 (C.A. 4th). However, there is adequate basis here, as previously shown by the evidence outlined, for the Tax Court's refusal to base its determination entirely on the opinion evidence of the experts offered by taxpayer. See *Tracy v. Commissioner*, 53 F. 2d 575 (C.A. 6th), certiorari denied, 287 U.S. 632.

Taxpayer contends that it was error for the Tax Court to base its finding on the fact that on July 31, 1952, it was known that not less than one-third of the crop could not be sold. (Br. 12-15.) However, it is crystal clear from the evidence that year after year the final determination of salable quantity by the Secretary did not vary substantially from the recommendation by the Board. (R. 116.) As pointed out, for the year involved, on July 17, the Board made its recommendation which ultimately was identical to the final determination. (R. 105.) Moreover, hop growers and dealers generally were aware of the Board's recommendation and of the likelihood of that recommendation being finally adopted. (R. 119.) In these circumstances, the effect of taxpayer's contention is to have the Tax Court disregard the obvious.

CONCLUSION

The record fully supports the Tax Court's finding that the fair market value of the growing hops was \$11,500 on the critical date of July 31, 1952. Accordingly, the decision of the Tax Court is not clearly erroneous and should be affirmed.

Respectfully submitted,

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JULY 1957.

In the
United States Court of Appeals
For the Ninth Circuit

ESTATE OF GRACE N. WILLIAMS,

Deceased,

Ralph E. Williams, Executor, *Petitioner*,

v.

COMMISSIONER OF INTERNAL

REVENUE, *Respondent*.

NO. 15503

REPLY BRIEF FOR PETITIONER

ON PETITION FOR REVIEW OF DECISION OF THE
TAX COURT OF THE UNITED STATES

CLARENCE P. LeMIRE, JUDGE

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In the
United States Court of Appeals
For the Ninth Circuit

ESTATE OF GRACE N. WILLIAMS, Deceased,
Ralph E. Williams, Executor, *Petitioner*,
v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

} NO. 15503

REPLY BRIEF FOR PETITIONER

On petition for review of decision of The Tax Court
of the United States

CLARENCE P. LeMIRE, JUDGE

INTRODUCTION

The Respondent's brief (as does the opinion of The Tax Court of the United States) contains a basic misstatement of fact without which neither the opinion of the Tax Court nor the contentions of the Respondent can be supported.

Respondent includes in this statement the following (Br. 8): “. . . He (Ralph E. Williams, Jr.), was a member of the Hop Control Board and in 1952 he

participated in its deliberations which resulted in recommending that approximately 36 per cent of the crop be declared non-salable . . ." (R. 117).

ARGUMENT

The statement made by the Court (R. 119), upon which Respondent relies, is very plainly wrong. The testimony in this case is that the Hop Control Board did not determine or recommend that a particular percentage or portion of any crop be declared salable or non-salable. The function of the Board was to estimate and recommend to the Secretary of Agriculture the total pounds of hops the brewing industry could be expected to use during the coming year (R. 104, 105). At the time the estimate was made it could not be, nor was it related to or expressed as a percentage of the then growing crop.

Throughout the trial of this case and on brief (R. 14, 17) the Respondent attached great weight to the fact that the Secretary of Agriculture adopted the salable quantity recommended by the Hop Control Board without any material changes during the years the Board acted. When it is considered that the function of the Board was to estimate quantity of hops the industry could consume during the twelve-month period beginning September 1 of each year and that the rec

ommendation was adopted during the first month prior to the beginning of that twelve-month period, it is apparent that the Secretary would have little if any information or facts upon which to base a change in the quantity recommended by the Board and would of necessity accept the judgment of the Board (composed of members of the industry) regarding its requirements during the coming year. That the Secretary made no substantial change in the salable quantity of hops recommended by the Board, when viewed in its proper perspective, is determinative of nothing more than that the Secretary presumed that the brewers, growers, and dealers acting on the Board were more capable of estimating the quantity of hops required by the industry during the coming year than he. Respondent's assertion (Br. 17), that "it is crystal clear that the final determination of salable quantity by the Secretary did not vary substantially from the recommendation of the Board" (R. 17), does not transform salable *quantity* into salable *percentage*.

An estimate of the growing crop made as of July 1 was available to the Board and to the public at the time of the Hop Control Board meeting on July 17, 1952 (R. 106). This estimate was made two months before harvest and would of necessity be based solely upon vine growth to that time. There is uncontradicted testi-

mony in the record that an estimate of the growing hop crop made only one month prior to harvest was not reliable and could vary from 1 to 2 bales per acre (R. 78), or as much as 30 per cent under the crop harvested, and that an estimate was seldom over (R. 66). From this, it is evident that the estimated yield of the growing crop available to the Board at the time of its meeting would be of little, if any, value, and that as the witness testified, the total production "did not constitute any element whatsoever in that (the Board's) determination," (R. 57) of salable quantity. Respondent's witness testified that the determination of the total crop available (of which the salable *quantity* was ultimately expressed as a salable *percentage*) was not and could not be made, "until every last bale was weighed and every last unharvested acreage was estimated by the Board and the figures established" (R. 105, 106).¹

Upon completion of this work (performed from October to December), the poundage recommended by the Board was then expressed by the Secretary of Agriculture as a proportion of the current crop that the growers would be permitted to sell.²

¹ The witness, Robert H. Eaton, further testified that "when we are speaking in terms of the percentage, the final depends upon the final production" (R. 107).

² The first notice of a tentative salable allotment (percentage) of the 1952 crop was mailed to the growers some time during October, 1952 (R. 81). The final notice establishing the actual salable *percentage* of the 1952 crop was not forwarded to the growers until about December 15 (R. 108).

The Petitioner submits that the (Hop Control Board) recommendation of the quantity to be *sold*, made during July, could not affect the quantity of hops *harvested* from one to two months later; and that the *percentage* of the crop to be sold could be determined only after the *available quantity* was known. If therefor follows, the Board could not during July establish the percentage of the crop each grower would be permitted to sell.

The testimony in this case relating to the harvest of the crop, the time of its maturity, and the risk of loss was all directed to hops growing in the Willamette River area in Marion and Polk Counties in the State of Oregon (R. 39). The witnesses did not testify, nor is here any evidence in the record regarding the time of maturity or harvest of other hops growing east of the mountains in Oregon or in the States of Washington, Idaho, or California, all of which were subject to controls and to the order of the Secretary of Agriculture which established the salable quantity of hops produced during 1952 at 39,200,000 pounds, 17 F.R. 7187, (Petitioner's Br. 25). None of the witnesses testified regarding the dates of maturity, the risk of loss, harvesting conditions, or the dates of harvest of hops growing in any area other than in the immediate vicinity of the Ola Farm.

It is apparent that the Tax Court and the Respondent have considered the testimony of the witnesses regarding the maturity of hops during August and early September and the lack of any risk of loss subsequent to July 31, 1952, as applicable to all hops regardless of where grown. When considered in this light, it is apparent how the Tax Court, and Respondent as well, mistakenly assumed the July 17 meeting of the Hop Control Board in Portland, Oregon, and its recommendation of salable *quantity*, synonymous with and determinative of the salable *percentage* of the then growing crop which could ultimately be sold.

This Court can take judicial notice that the climatic conditions in Western Oregon are not similar to the climatic conditions in Eastern Oregon, or in the States of Idaho, California, or Washington, and that crops of like kind growing in each of these areas will not mature at the same time, nor will the risk of loss from disease on July 31 necessarily be the same in the different areas. From this and the preceding, it is obvious that the Hop Control Board could not possibly estimate or recommend the *salable percentage* of the hop crop growing at July 17, which the industry could use because it was not known at that time what the harvest in the various areas would be. The Hop Control Board could only recommend (as it did) the *salable quantity* (ir

ounds) of hops the brewing industry could be expected to consume during the succeeding year.

The record contains no testimony or evidence to support Respondent's contention that at July 31, 1952, so substantial a portion of the crop (35%) was known to be unsalable and worthless unless retroactive effect to July is given to the determination made by the Secretary of Agriculture some three to five months later.³

In a footnote (Br. 14), Respondent argues that the taxpayer's calculation of 49 cents per pound is excessive because of immaturity of the crop, and refers to the costs of harvest and the average sales price of the crop at a lesser figure in support of his contention. The Respondent has mistaken the Petitioner's contention which is that a price of 49 to 52 cents per pound of hops at July 31 was unreasonably low in view of the facts shown at that date and that a grower would not sell at these prices or for any sum less than the costs of production and care of the crop. Respondent's footnote ignores the testimony in this proceeding that difficulty

³ When asked regarding this, C. W. Paulus testified that the dealers and growers did not assume that the surplus percentage would be as high as fully designated, and that they figured that it would be at the most 25 percent or even less than that, (R. 87, 88). The salable percentage for the year 1950 was 85%; for the year 1951, the salable percentage was 74%. It was stipulated and the Court so found that in both of these years, receipts from sales of hops exceeded the costs of growing and harvesting, (R. 31).

in the use of mechanical hop picking machines and the friable nature of the crop were the proximate causes of a yield of only five bales of hops to the acre during the year 1952 (R. 50), which resulted in an increase of harvest costs during 1952 over the normal experience anticipated. Neither of these factors could have been known at July 31.⁴

Elsewhere, the Respondent advances the argument that it is "especially significant concerning value that as of the critical date, no contract had been consummated for the sale of this crop" (Br. 12). This contention is refuted by the uncontroverted testimony that the hops could have been contracted at the critical date for delivery after harvest had the Petitioner been willing to sell (R. 46, 80); however, the Petitioner would not sell at this price because it was too low (R. 48).⁵

The Respondent contended before the Tax Court that Ralph E. Williams, Jr. (who managed the decedent's financial affairs), as a member of the Hop Control Board participated in the meeting of the Board on

⁴ Respondent's Exhibit B (R. 111), establishes that during the year 1952 the hop growers in Oregon realized an average of 38 cents per pound for hops, the vine (sales price *after deduction* of harvest costs), as compared to Respondent's contention here (Footnote Br. 14) of a sales value of from 30 to 35 cents per pound *before deduction* of harvest costs.

⁵ Respondent's Exhibit B (R. 111), also establishes that Oregon hop growers realized an average sales price of 62 cents per pound during the year 1952. Apparently the Petitioner was not alone in refusing to sell or contract for the sale of the hops at the bid prices in effect at July 31, 1952 (49 to 52 cents). It is conceded that the Petitioner did later sell for a lesser figure. Such sales are not, however, determinative of the value of the hops at a prior time as Respondent implies (Footnote Br. 14).

July 17, 1952, at which time it was decided that a major portion of the then growing 1952 hop crop could not be sold; that as a result of this meeting, Williams knew that a loss would be sustained upon the subsequent sale of the 1952 crop and therefor liquidated the corporation and distributed the crop to the petitioner in order to obtain an offset against the Petitioner's other income (R. 54, 56, 58).

The Tax Court found that the Hop Control Board did at the meeting held July 17, 1952, recommend the available *percentage* of the 1952 crop which could be sold (R. 119), and from this established that it was known to the Petitioner that one-third or more of the crop was not available. The Court of Appeals is not bound by the findings of the Tax Court if that Court in appraising the situation used an improper yardstick as it did in the present instance; *Riddlesbarger v. Commissioner*, 200 F.2d 165, 171 (7th Cir. 1952).

In effect, the Court held that the Petitioner did not sustain the burden of proof although the Petitioner adduced testimony of a business purpose for liquidation (R. 55, 60), that the crop was worth the cost of production, and (assuming the facts in this case) that a grower would not sell for less than 30 cents per pound of the vine on July 31, 1952 (R. 67, 68). The testimony

further establishes that Ralph Williams was aware that he could have obtained the entire crop as a deduction from income without question had there been a reason to so elect, R. 62, 63.

In view of the Court's erroneous finding that the Hop Control Board recommended the *salable percentage* of the growing crop (R. 119), it is not surprising that the inferences and conclusions drawn by the Tax Court from the evidence adduced at the trial substantially upheld the contention of the Respondent that the growing crop had only a nominal value and that the taxpayer's intent in liquidating Eola Farms, Inc. was to obtain a loss for tax purposes. This was error; *Gillettes Estate et al. v. Commissioner* 182 F. 2d. 1010 (9th Cir. 1950).

The Tax Court committed further error when it did not follow the rule for valuation of special properties set forth in its opinion (R. 118), and in effect imposed a penalty upon the taxpayer by placing a value upon the growing crop which, as pointed out in Petitioner's brief (Br. 19), represents a valuation based upon minimum bid price and yield and maximum harvest costs, subject to a reduction of salable crop much greater than the taxpayer had experienced theretofore.

In two comparatively recent cases involving the fair market value of property for estate tax purposes, the Court of Appeals for the Eighth Circuit commented upon the limits of the discretionary power of the Tax Court to determine the fair market value of property. In general, the Court ruled that the value fixed by the Tax Court must be supported by substantial evidence. More specifically in the first case involving the valuation of a farm subject to gift taxes, the Court stated that the Tax Court cannot arbitrarily ignore expert testimony where there is no evidence to refute it and the Tax Court has no knowledge or experience of its own. *Cullers, Frances M. v. Commissioner*, 237 F.2d. 611 (8th Cir. 1956).

The second case decided by the same Court, October 30, 1956, involved the valuation of corporate stock certificates for estate tax purposes. The decision of the Tax Court was affirmed (with a strong dissent) because although there was expert opinion as to value, the Court held that the Tax Court was not bound by such testimony because there was other substantial evidence (financial statements of the corporation) upon which the Tax Court could base a determination, *Estate of R. Fitts v. Commissioner*, 237 F. 2d. 729 (8th Cir. 1956).

That the Tax Court had no experience or special knowledge of the subject matter (the growing hop crop in this proceeding, is apparent from the Court's misunderstanding of the function of the Hop Control Board and its finding that the recommendation of salable quantity made by the Hop Control Board during July was synonymous with salable percentage determined by the Secretary of Agriculture some three to five months later.

CONCLUSION

The judgment of the Tax Court should be reversed and the case remanded for a new trial because the Court misunderstood the function of the Hop Control Board; as a result ^{The Court} gave retroactive effect to July 31, 1952, of subsequent events affecting the market value of the crop, and for the further reason that the Court failed to apply the rule of "reasonableness and common sense" which it said was determinative of the value of the crop at July 31, 1952.

Respectfully submitted,

JOHN L. FLYNN,

BURTON L. COAN,

Attorneys for Petitioner.

No. 15504

United States
Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant.

VS.

HELEN McARTHY WILLOUGHBY,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Northern Division.

MAY 14 1957
PAUL P. O'BRIEN, CLERK

No. 15504

**United States
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UNITED STATES OF AMERICA,

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Transcript of Record

**Appeal from the United States District Court for the
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Attorneys, Department of Justice,

Washington 25, D. C.

In the District Court of the United States,
Southern District of California, Northern Division

No. 1448—ND

HELEN McCARTHY WILLOUGHBY,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT

Comes now plaintiff, Helen McCarthy Willoughby,
and complains of defendant, and for cause of action
alleges:

I.

That plaintiff is now and at all times herein mentioned was a resident of the City of Tulare, in the County of Tulare, State of California, residing at 333 East Inyo Street, Tulare, California.

II.

That on or about the 1st day of September, 1944, John R. Willoughby entered upon active duty with the Army of the United States; that John R. Willoughby, at said time and date, was assigned Service No. T 184 054 by the Army of the United States; that on or about the 1st day of October, 1944, the said John R. Willoughby purchased and placed in force and effect with the Veterans Administration

of the United States of America National Service Life Insurance Policy Number N-1758-73-96 for the sum of Ten Thousand and no/100 [2*] Dollars (\$10,000.00); that, pursuant to the terms and conditions of said policy, the plaintiff, Helen McCarthy Willoughby, was named the beneficiary of said National Service Life Insurance Policy; and that at all times herein mentioned said Life Insurance Policy was in full force and effect and the plaintiff was named and maintained as beneficiary of said Life Insurance Policy.

III.

That the plaintiff, Helen McCarthy Willoughby, is the mother of John R. Willoughby, and that on or about the 24th day of May, 1952, the said John R. Willoughby died in the City of Fresno, County of Fresno, State of California; that on or about the 15th day of October, 1952, pursuant to the terms and conditions of said policy hereinabove referred to, the plaintiff, Helen McCarthy Willoughby, as beneficiary, made application to the Veterans Administration of the United States of America for payment of the proceeds of said Life Insurance Policy, to wit, the sum of Ten Thousand and no/100 Dollars (\$10,000.00); that on or about the 25th day of March, 1953, the claim of the plaintiff, as aforesaid, was denied by the Veterans Administration of the United States of America; that subsequent to said denial, the plaintiff, Helen McCarthy Willoughby, appealed said denial to the Board of Veterans' Appeals of the Veterans Administration.

*Page numbering appearing at foot of page of original Certified Transcript of Record.

of the United States of America; and that on the 19th day of August, 1953, said appeal was denied by said Board.

IV.

That plaintiff has at all times since the 24th day of May, 1952, continuously made demand upon the Veterans Administration of the United States of America for payment of said claim as hereinbefore set forth and that the said Veterans Administration has refused and continues to refuse to pay the same, and that there is now due, owing and unpaid upon said Life Insurance Policy the sum of Ten Thousand and No/100 Dollars (\$10,000.00), plus interest upon said [3] sum at the rate of seven per cent (7%) per annum from the 24th day of May, 1952, until paid.

Wherefore, plaintiff prays judgment against defendant in the sum of Ten Thousand Dollars (\$10,000.00), together with interest thereon at the rate of seven per cent (7%) per annum from May 24th, 1952, until paid.

/s/ ADOLPH FEIERBACH,
Attorney for Plaintiff.

Duly verified.

[Endorsed]: Filed March 18, 1955. [4]

[Title of District Court and Cause.]

ANSWER OF DEFENDANT, UNITED STATES
OF AMERICA, AND DEMAND FOR JURY
TRIAL

Comes Now the defendant, United States of America, and in answer to plaintiff's Complaint on file herein, admits, denies and alleges as follows:

I.

In answer to the allegations contained in Paragraph I of plaintiff's Complaint, the defendant admits the allegations contained therein.

II.

In answer to Paragraph II of plaintiff's Complaint, this answering defendant admits that John R. Willoughby entered active duty with the United States Military Forces and, effective October 1, 1944, was issued National Service Life Insurance in the amount of \$10,000 under Certificate No. N 17 587 396 for which he designated his mother Helen McCarthy Willoughby, the plaintiff herein as sole beneficiary; the defendant denies generally and specifically that [5] said life insurance policy was in full force and effect at all times mentioned in the Complaint. The defendant alleges that said insurance policy lapsed for non-payment of premiums on October 1, 1947.

III.

In answer to Paragraph III of plaintiff's Complaint, the defendant admits the allegations contained therein.

IV.

In answer to Paragraph IV of plaintiff's Complaint, the defendant admits that the plaintiff has continuously made demand upon the Veterans Administration for payment and that the Veterans Administration and the defendant have refused and continue to refuse to make payment; this defendant denies each and every other allegation contained in said Paragraph IV of plaintiff's Complaint.

First Affirmative Defense

For its first affirmative defense, the United States of America alleges as follows:

I.

That John R. Willoughby, herein referred to as the "veteran" entered the active military service of the United States of America in September of 1944.

II.

Effective October 1, 1944, the veteran was issued National Service Life Insurance in the amount of 10,000 under Certificate No. N 17 587 396 on the five year level premium term plan for which he designated his mother, Helen McCarthy Willoughby, who is hereinafter referred to as the plaintiff, as sole beneficiary.

III.

The insurance remained in effect on a premium paying basis until October 1, 1947, when it lapsed for nonpayment of the premium due on that [6] date.

IV.

On July 12, 1948, the veteran executed a non-medical application for reinstatement of the lapsed insurance on a comparative health basis. In said application for reinstatement form, the veteran fraudulently misrepresented his comparative health and his statement regarding any illnesses suffered or treatment obtained since the lapse of the insurance.

V.

The veteran knowingly made such false representations which concern a material fact with intent to deceive.

VI.

The defendant, relying on such false representations made by the veteran reinstated said insurance as of July 1, 1948.

VII.

Said action of the defendant in reinstating said insurance in reliance upon the veteran's misrepresentations was void in law and of no force and effect.

Second Affirmative Defense

For its second affirmative defense, the defendant alleges as follows:

I.

That paragraphs I and II of defendant's First Affirmative Defense are hereby incorporated into this, the Second Affirmative Defense, as though set forth in full.

II.

That the insurance lapsed for nonpayment of premium due on December 1, 1949.

III.

On February 6, 1950, the veteran executed a non-medical reinstatement application which included a certification as to his comparative health. [7]

IV.

That the veteran misrepresented his comparative health condition and the fact that he had not been under treatment for any illness since the lapse of the insurance policy.

V.

That the veteran knowingly made said misrepresentation with intent to deceive the defendant as to a material fact concerning the reinstatement of the insurance policy.

VI.

Relying upon said misrepresentation, the defendant reinstated said insurance effective February 1, 1950. This action of the defendant, based upon the misrepresentation of the veteran, was void in law and of no force and effect.

Third Affirmative Defense

For his Third Affirmative Defense, the defendant alleges as follows:

I.

Paragraphs I and II of defendant's First Affirmative Defense are herein incorporated as though set forth in full in this, the defendant's Third Affirmative Defense.

II.

Said insurance lapsed for nonpayment of premiums due September 1, 1950.

III.

The veteran thereafter executed a reinstatement application form which contained a Certificate of the veteran as to his comparative health since the lapse of the insurance and as to any treatment for illness received by him since the lapse of the insurance.

IV.

That the veteran misrepresented the condition of his health [8] and the statement with reference to treatment for illness since the lapse of the policy.

V.

That the misrepresentation as to his health was knowingly made by the veteran with intent to deceive the defendant as to a material fact in the reinstatement application.

VI.

That a further statement was executed by the veteran on December 1, 1950, in which the veteran stated that he was in as good health on October 18, 1950, as he had been on September 1, 1950, and that he had not received any treatment for illness during the same time.

VII.

The veteran's statement of December 1, 1950, was a misrepresentation of a material fact which had

been knowingly made by the veteran with intent to deceive the defendant.

VIII.

Relying on the foregoing misrepresentations of the veteran, the defendant reinstated said insurance policy on December 4, 1950. Said action of the defendant in reinstating said policy was void in law and of no force and effect due to the fact it was based upon a misrepresentation of the veteran.

Wherefore, defendant prays for judgment as follows:

1. That judgment be rendered in favor of defendant and against the plaintiff dismissing plaintiff's Complaint;
2. That the defendant recover its costs;
3. That the defendant recover such further and additional relief as to the Court seems meet and just on the premises. [9]

LAUGHLIN E. WATERS,
United States Attorney;

MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief of Civil Division;

/s/ ANDREW J. DAVIS,
Assistant U. S. Attorney,
Attorneys for Defendant.

Demand for Jury Trial

The defendant hereby demands a jury trial as to all issues triable as of right by jury in the within action.

Dated: This 16th day of June, 1955.

LAUGHLIN E. WATERS,
United States Attorney;

MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief of Civil Division;

/s/ ANDREW J. DAVIS,
Assistant U. S. Attorney,
Attorneys for Defendant.

[Endorsed]: Filed June 16, 1955. [10]

[Title of District Court and Cause.]

PRETRIAL STIPULATION

Received in evidence as Defendant's Exhibit A

The parties, by and through their respective counsel hereto, submit the following Pretrial Stipulation regarding facts which are admitted and will require no further proof.

1. John R. Willoughby herein referred to as the veteran, entered the active military service in September, 1944, and was retired with the rank of Flight Officer in November, 1945, because of diabetes mellitus.

2. The veteran applied for and was issued National Service Life Insurance Policy No. N 17 587 396 in which he designated his mother Helen McCarthy Willoughby, the plaintiff herein, as the sole beneficiary.

3. On September 28, 1944, the veteran cancelled his prior designation and named the plaintiff as primary beneficiary and his wife, Edythe Rose Willoughby, as contingent beneficiary. This last designation of beneficiary was affirmed by the veteran [12] on August 21, 1950, at which time a lump sum mode of settlement of the insurance was selected.

4. Upon the veteran's retirement from the active military service, he was granted a hearing before the Army Retirement Board, a copy of which proceedings will be offered in evidence as Plaintiff's Exhibit A.

5. Following the original granting of insurance by the defendant to the veteran, the policy remained in effect on a premium paying basis to October 1, 1947, when it was declared by the VA to have lapsed for nonpayment of premium due on that date.

6. On July 12, 1948, the veteran executed a form, copy of which is attached hereto as Exhibit B entitled "Application for Reinstatement" which contains the following questions and answers:

Q. 8. "Are you now in as good health as you were on the due date of the first premium in default?"

A. "Yes."

Q. 9. "Have you been ill, or suffered or contracted any disease, injury, or infirmity, or been prevented by reason thereof from attending your usual occupation, or consulted a physician, surgeon, or other practitioner for medical advice or treatment at home, hospital, or elsewhere, in regard to your health, since lapse of this insurance?"

A. "No."

7. Said Reinstatement Application designated as Exhibit B was received by the Veterans Administration on July 13, 1948, and a sufficient amount having previously been tendered by the veteran to cover the payment of the premiums required for reinstatement on a comparative health basis, and the Application appearing regular on its face, the insurance was reinstated in accordance with established practice as of July 1, 1948. [13]

8. Premiums were paid on the reinstated insurance through November 30, 1949, and the insurance again was declared by VA to have lapsed for nonpayment of the premium due on December 1, 1949.

9. On February 6, 1950, the veteran executed another Reinstatement Application, a copy of which is attached hereto as Exhibit C. Included therein is a certification containing language similar to that in the certification appearing in his heretofore referred to Application dated July 12, 1948. The following questions and answers appear on this Application for Reinstatement:

Q. 10. "Are you now in as good health as you were on the due date of the first premium in default?"

A. "Yes."

Q. 11. "Have you been ill or suffered or contracted any disease, injury, or infirmity, or been prevented by reason thereof from attending your usual occupation, or consulted a physician, surgeon, or other practitioner for medical advice or treatment at home, hospital or elsewhere, in regard to your health since the lapse of this insurance?"

A. "No."

10. This Application after being mailed by the veteran on February 8, 1950, together with a remittance in an amount sufficient to cover the premiums required for reinstatement on a comparative health basis was received by the Veterans Administration on February 9, 1950, and it appearing regular on its face, the insurance was reinstated as of February 1, 1950.

11. After February 9, 1950, the veteran paid premiums as they became due through August 31, 1950, when the insurance was declared by VA to have lapsed again for nonpayment of premium. [14]

12. The veteran was advised on October 3, 1950, by the Chief, Premium Accounting Division, of the Veterans Administration, Oakland District Office, that the insurance had lapsed, and that if he desired to continue his insurance, he might apply for reinstatement by applying for and signing a Reinstatement Application form.

13. On October 19, 1950, the nonmedical Reinstatement Application form, a copy of which is attached hereto as Exhibit D signed by the veteran was received by the Veterans Administration. This Application had been mailed October 18, 1950, with "August 30, 1950," being set forth as the date of the Application. The following questions and answers appear on this form:

Q. 10. "Are you now in as good health as you were on the due date of the first premium in default?"

A. "Yes."

Q. 11. "Have you been ill or suffered or contracted any disease, injury, or infirmity, or been prevented by reason thereof from attending your usual occupation, or consulted a physician, surgeon, or other practitioner for medical advice or treatment at home, hospital or elsewhere, in regard to your health since the lapse of this insurance?"

A. "No."

14. On November 29, 1950, a letter was addressed to the veteran by the Chief, Premium Accounting Division of the Veterans Administration, Oakland District Office, in which the veteran was advised that since his Reinstatement Application bearing the date "August 30, 1950," was not mailed or otherwise delivered to the Veterans Administration within five days after said date, as required by the [1] pertinent regulations, it was necessary that he execute and return the Statement transmitted therewith in order that consideration might be given

the Application. The Statement was executed by the veteran on December 1, 1950, a copy of which is attached hereto as Exhibit E.

15. Following the receipt of the said Statement by the Veterans Administration on December 4, 1950, the insurance in question was reinstated and remittances were regularly tendered by the veteran on account of premiums until his death which occurred in the Veterans Administration Hospital, Fresno, California, on May 24, 1952.

16. On June 16, 1952, the plaintiff filed a formal claim for insurance benefits with the Veterans Administration.

17. Thereafter, the Disability Insurance Claims Division of the Veterans Administration, Denver District Office, made its determination determined on March 16, 1953, that the veteran had not been totally disabled for insurance purposes on July 12, 1948, or February 6, 1950, but that he had been so disabled on October 18, 1950, and thereafter on March 18, 1953, the Chief Medical Consultant, Underwriting Division, of said office, held that if the medical evidence currently of record had been disclosed when the various Reinstatement Applications were made, the Applications would have been medically rejected.

18. A formal decision was subsequently rendered by the Director of the Claims Service on May 14, 1953, wherein it was held that nothing was payable on account of the insurance because of the veteran's

misrepresentations as to the state of his health when he applied for reinstatement.

19. Plaintiff thereafter appealed to the Board of Veterans' Appeals the decision disallowing her claim and that Board denied her appeal by decision dated August 19, 1953. [16]

21. The insurance policy which is the subject of this action is in the amount of \$10,000 designated Certificate No. N 17 587 396 and is on the five year level premium term plan.

Dated: This 9th day of November, 1955.

LAUGHLIN E. WATERS,
United States Attorney;

MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief of Civil Division;

/s/ ANDREW J. DAVIS,
Assistant U. S. Attorney,
Attorneys for Defendant.

/s/ ADOLPH FEIERBACH,
Attorney for Plaintiff. [17]



EXHIBIT C

Budget Bureau No. 70-2170
Approval expires 5-31-61.

VETERANS ADMINISTRATION APPLICATION FOR REINSTATEMENT (NONMEDICAL)

NATIONAL SERVICE LIFE INSURANCE FIVE-YEAR LEVEL PREMIUM TERM PLAN AND TOTAL DISABILITY INCOME PROVISION

(This form not to be used in connection with permanent plans of insurance)

DO NOT WRITE IN THIS SPACE
(For use of VA Index)

This form of application for reinstatement of lapsed level premium term insurance if physical examination is not made at time of application for reinstatement. Please type or use ink.

NAME—FIRST NAME—LAST NAME (Print or type)

JOHN R. WILLOUGHY

HOME ADDRESS FOR INSURANCE PURPOSES (Number and street or rural route, city or P. O., zone number and state)

55 NORTH K STREET, TULARE, CALIFORNIA

KIND OF SERVICE (Check one)

☐ NAVY ☒ AIR FORCE ☐ MARINE CORPS

S. SERVICE SERIAL NO.

ST GUARD ☐ OTHER (Specify)

T-184054

2. POLICY NO(s). (If known)

FN-

N-1758-73-96

FV-

V-

FH-

H-

AMOUNT OF INSURANCE TO BE REINSTATED

\$1,000

DUE DATE OF PREMIUM IN DEFAULT

12-1-49

MONTHLY PREMIUM

\$ 6.00

AMOUNT TENDERED WITH THIS APPLICATION

\$ 27.00

AMOUNT OF TOTAL DISABILITY INCOME PROVISION TO BE REINSTATED

DUE DATE OF PREMIUM IN DEFAULT

MONTHLY PREMIUM

\$

AMOUNT TENDERED WITH THIS APPLICATION

\$

METHOD OF PAYMENT OF FUTURE PREMIUMS (Check one)

☐ DIRECT ALLOTMENT
☐ SERVICE PAY

☒ DIRECT REMITTANCE TO
 VETERANS ADMINISTRATION
 (Specify mode in item 9)

9. MODE (Monthly, quarterly, semiannually, or annually)

QUARTERLY

TOTAL MONTHLY PREMIUM

6.80

TOTAL AMOUNT TENDERED

\$27.20

☐ DEDUCTION FROM VA COMPENSATION,
☐ OR RETIREMENT PAY

COMPARATIVE HEALTH STATEMENT

I hereby apply for reinstatement of my National Service Life Insurance in the amount stated above. As a condition to the reinstatement of this insurance, I warrant that the answers to the following questions are complete and true to the best of my knowledge and belief. I understand that statements made by me in this application are relied upon in reinstating insurance; that any deception or false statement either by inference, omission, or otherwise may result in cancellation of insurance or in refusal to pay a claim on the policy; and that, in either event, premiums are not returnable.

☐ I AM NOW IN AS GOOD HEALTH AS I EVER WAS OR THE DUE DATE OF MY NEXT PREMIUM IS DUE

☒ I HAVE FORGOTTEN TO PAY MY PREMIUM OR CONTRACTED ANY DISEASE, INJURY, OR INFIRMITY, OR BEEN PREVENTED BY REASON THEREOF FROM ATTENDING TO MY USUAL OCCUPATION, OR CONSULTED A PHYSICIAN, SURGEON, OR OTHER PRACTITIONER FOR MEDICAL ADVICE OR TREATMENT, OR BEEN IN HOSPITAL OR ELSEWHERE, IN REGARD TO YOUR HEALTH SINCE THE LAPSE OF THIS INSURANCE

☐ NO ☐ YES (If "yes," complete item 12)

12. DISEASE OR INJURY OR INFIRMITY (Name and address of all practitioners and, if readily available, attach to this application a certificate of the physician or other practitioner who examined, with diagnosis, prognosis, and treatment)

Amt. Received 13.40

 Collections Div. is
 different from inclosure
 mentioned

I HEREBY CERTIFY THAT:

This application must be accompanied or preceded by the premium for at least two monthly premiums (no interest) on the amount of insurance to be reinstated, or premium for the month of lapse (grace period), and the premium for the premium month in which application is mailed or otherwise delivered to the Veterans Administration.

If acceptable, reinstatement will be effective as of the premium due date immediately preceding the date this application is mailed or otherwise delivered to the Veterans Administration; except that when no acceptable application is mailed or otherwise delivered to the Veterans Administration on a premium due date, reinstatement will be effective as of the date of this application.

The Veterans Administration may require a report of physical examination in connection with this application if deemed necessary.

This form must be fully completed and signed by me and mailed or otherwise delivered to the Veterans Administration immediately thereafter.

In order to prevent a subsequent lapse of this insurance, premiums must be paid each month as they become due while this application is receiving consideration. The next premium will be due and payable on the premium due date immediately following the date this application is mailed or otherwise delivered to the Veterans Administration.

Any indebtedness against this insurance must be paid.

Checks, drafts, money orders, and postal notes should be drawn payable to the Treasurer of the United States and mailed to the Collections Unit, Veterans Administration office where my insurance records are maintained.

I am obligated to advise the Veterans Administration of any change of health condition arising after the date of execution of this form and prior to its delivery to the Veterans Administration.

14. DATE OF APPLICATION

TULARE CALIFORNIA 2/6/50

15. SIGNATURE OF APPLICANT (Do not print. Application must be signed and dated)

John R. Willoughy

Y.—The law provides that whoever makes any statement of a material fact, knowing it to be false, shall be punished by a fine of not more than \$5,000 or by imprisonment for not more than one year, or both.

 9-3532 SUPERSEDES VA FORM 5, MAY 1947,
 WHICH WILL NOT BE USED.

16-50010-1 G. G. GOVERNMENT PRINTING OFFICE



EXHIBIT D

Budget Bureau Form 76-R174
Approval expires 5-31-51.

VETERANS ADMINISTRATION
APPLICATION FOR REINSTATEMENT
(NONMEDICAL)

DO NOT WRITE IN THIS SPACE
(For use of VA Indus)

NATIONAL SERVICE LIFE INSURANCE
FIVE-YEAR LEVEL PREMIUM TERM PLAN
AND TOTAL DISABILITY INCOME PROVISION

(This form not to be used in connection with permanent plans of insurance)

Form of application for reinstatement of lapsed level premium term insurance if physical examination is not
at time of application for reinstatement. Please type or use ink.

NAME (Middle Name - Last Name (Print or type))
John R. Willoughby
ADDRESS FOR INSURANCE PURPOSES (Number and street or rural route, city or P. O., zone number and
255 NORTH K STREET - Tulare Calif.

2. POLICY NO(S). (If known)
FN
N- **1758-73-96**
FV
VH
H-

3. SERVICE (Check one)
☐ NAVY ☒ AIR FORCE ☐ MARINE CORPS
4. SERVICE SERIAL NO
T 184054

5. AMOUNT OF INSURANCE TO BE REINSTATED 10,000	6. DUE DATE OF PREMIUM IN DEFAULT September 1, 1950	7. MONTHLY PREMIUM 6.80	8. AMOUNT TENDERED WITH THIS APPLICATION 20.42
9. AMOUNT OF TOTAL DISABILITY INCOME PROVISION TO BE REINSTATED	10. DUE DATE OF PREMIUM IN DEFAULT	11. MONTHLY PREMIUM	12. AMOUNT TENDERED WITH THIS APPLICATION
13. TYPE OF PAYMENT (Check one) <input checked="" type="checkbox"/> DIRECT REINSTATEMENT TO VETERANS ADMINISTRATION (Specify mode in item 7) <input type="checkbox"/> OTHER (Specify) COMPENSATION	14. MODE (Monthly, quarterly, semiannually, or annually) quarterly	15. TOTAL MONTHLY PREMIUM	16. TOTAL AMOUNT TENDERED 20.40

COMPARATIVE HEALTH STATEMENT

I hereby apply for reinstatement of my National Service Life Insurance in the amount stated above. As a condition to the reinstatement of this insurance, I understand that statements made by me in this application are complete and true to the best of my knowledge and belief. I understand that statements made by me in this application are subject to the provisions of the policy and that in case of a change of facts, the insurance may be terminated.

17. HOW IN AS GOOD HEALTH AS WHEN THE DUE DATE OF PREMIUM IN DEFAULT?
☐ NO ☒ YES **NO** (If "yes," complete item 12)

18. RELEASE ON PLURRY (Include names and addresses of all practitioners and, if readily available, attach to this application a certificate of the physician or hospital where treated, with diagnosis, prognosis, and treatment)

EX-100 FILE
OCT 1 1950

REINSTATED
NATL SER LIFE ACCT
PREMIUM ACCT NO DIVISION
DATE **10-10-50**

NOTED THAT:

- (a) An application must be accompanied by the order of at least two monthly premiums (no interest) or the amount of insurance to be reinstated, premium for the month of lapse (lapse period), and the premium for the premium month in which application is mailed or otherwise delivered to the Veterans Administration.
- (b) Acceptable reinstatement will be effective as of the premium due date immediately preceding the date this application is mailed or otherwise delivered to the Veterans Administration (except that when an acceptable application is mailed or otherwise delivered to the Veterans Administration on a premium due date, reinstatement will be effective as of that date).
- (c) Veterans Administration may require report of physical examination in connection with this application if deemed necessary.
- (d) A form cannot be fully completed and signed by me and mailed or otherwise delivered to the Veterans Administration immediately thereafter.
- (e) In order to prevent a subsequent lapse of this insurance, premiums must be paid each month as they become due while this application is receiving consideration. The next premium will be due and payable on the premium due date immediately following the date this application is mailed or otherwise delivered to the Veterans Administration.
- (f) Indebtedness against this insurance must be paid.
- (g) Checks, drafts, money orders, and postal notes should be drawn payable to the Treasurer of the United States and mailed to the Collections Unit, Veterans Administration office where my insurance records are maintained.
- (h) I am obligated to advise the Veterans Administration of any change of health condition arising after the date of execution of this form and prior to its being sent to the Veterans Administration.

19. DATE OF APPLICATION
10-10-50
20. SIGNATURE OF APPLICANT (Signature must be signed and dated)
John R. Willoughby

21. The law provides that whoever signs any statement or memorandum, knowing it to be false, shall be punished by a fine of not more than \$5,000 or by imprisonment for not more than one year.



EXHIBIT E

9017

NOV 1950

Mr. John R. Willoughby

N 1758-73-06

I hereby certify that to the best of my knowledge and belief I was in as good health on October 18, 1950, as I was on September 1, 1950, the date of the first premium in default on my National Service Life Insurance account. Since the execution of the application, I have not been sick, or contracted any disease, or suffered any injury, or consulted a physician in regard to my health, or been prevented by reason of ill health or injury from attending my usual occupation, and that I am now in sound condition, mentally and physically, excepting as follows:

December 1, 1950
(Date)

John R. Willoughby
(Signature)

REINSTATED
NATL SER LIFE ACCT
PREMIUM ACCOUNTING DIVISION
John R. Willoughby

*Reviewed
12-17-1950
Schultz*

READY FOR FILE

DEC. 18 1950

RECORDED
NO. 100, 1000





[Title of District Court and Cause.]

ORDER FOR JUDGMENT

The above case came on for trial on February 9, 1956. The plaintiff was represented by Adolph Feierbach and the defendant was represented by Laughlin E. Waters, United States Attorney, Andrew J. Davis, Assistant United States Attorney, appearing. Following trial, briefs were submitted on behalf of the respective parties.

The complaint seeks a recovery in the sum of \$10,000.00 on a National Service Life Insurance policy issued by the United States. The defenses set forth in the answer allege that reinstatements of the policy were procured by fraudulent representations of the insured, and that the policy was and is null and void.

The veteran, John R. Willoughby, entered active military service in September, 1944, and was retired with the rank of Flight Officer in November, 1945, because of diabetes mellitus. He applied for and was issued National Service Life Insurance [22] Policy No. N-17587396, in which he designated his mother, the plaintiff herein, as the sole beneficiary. Later he designated the plaintiff as primary beneficiary and his wife as contingent beneficiary.

Following the original granting of insurance by the defendant to the veteran, the policy remained in effect on a premium-paying basis to October 1, 1947, when it lapsed for nonpayment of premium due on

that date. On July 12, 1948, the veteran made application for reinstatement which contained the following questions and answers:

Question 8: Are you now in as good health as you were on the due date of the first premium in default?

Answer: Yes.

Question 9: Have you been ill, or suffered or contracted any disease, injury, or infirmity, or been prevented by reason thereof from attending your usual occupation, or consulted a physician, surgeon, or other practitioner for medical advice or treatment at home, hospital or elsewhere, in regard to your health since lapse of this insurance?

Answer: No.

Question 10: Have you ever applied for disability compensation, retirement pay, pension or waiver of insurance premiums?

Answer: Yes.

On the form of application, there was a space provided for the "C-number," in the event Question 10 should be answered "yes." A "C-number" indicates to the Veterans Administration a claim. This space was not completed on the application. The evidence establishes without conflict that the veteran had made application to the Veterans Administration for treatment on May 25, 1948, and that the requested [23] treatment was authorized to be administered by Dr. E. R. Schottstaedt, of Fresno, and that such treatment was furnished at the office of

the physician from May 18, 1948, through June 30, 1948. The following services were rendered, and the bill for the treatments was certified by Dr. Schottsteadt:

“Office visit May 18, 1948.

“Office visit May 25, 1948.

“Blood sugar test May 19, 1948, 71.9 mg per 100 cc.

“N.P.N test 30.1 mg%.

“Glucose Tolerance Test May 20, 1948.

“Urinalysis May 25, 1948.”

The medical report of the physician to the Veterans Administration contains the following remarks:

“Medical discharge from army because of diabetes. Hospitalized while in the service. Has 100% disability pension. Has insulin reactions. * * * Physical findings: ankle Oedema, insulin reactions; hyperglycemia; glycosuria, diabetes, improperly controlled. Treatment and progress: Medications with progress. Diet. Diagnosis: Diabetes mellitus * * Is further treatment required? Yes.”

The diagnosis of diabetes mellitus was the same as the diagnosis of the Army physicians at the time the veteran was retired in 1945. In the transcript of the proceedings held on October 2, 1945, page 2, this evidence was produced:

“Maj. Miller: Have you made a recent physical examination of Mr. Willoughby?

“A [by Capt. Fred E. Maisel, MC] I have, on 2 October, 1945, in conjunction with Major Kane.

“Maj. Miller: Did you have access to the complete medical history of Mr. Willoughby at the time you made your examination?

“A. I did. [24]

* * *

“Maj. Miller: Captain Maisel, will you please state the results of your examination of Flight Officer Willoughby?

“A. As a result of our examination, we arrived at a diagnosis of Diabetes Mellitus.

* * *

“Maj. Miller: Do you consider this condition to be permanent? A. I do.”

The application form for reinstatement contained the following statements or warnings:

“As a condition to the reinstatement of this insurance I certify that the answers to the following questions are complete and true to the best of my knowledge and belief.

“Penalty—‘Any person who shall knowingly make or cause to be made, or conspire, combine, aid or assist in, agree to, arrange for, or in anywise procure the making or presentation of a false or fraudulent affidavit, declaration, certificate, statement, voucher, or paper, or writing purporting to be such concerning any application for insurance or reinstatement thereof, waiver of premiums or claim for benefits under National Service Life Insurance for

himself or any other person, shall, upon conviction thereof be punished by a fine of not more than \$1,000 or imprisonment for not more than one year, or by both such fine and imprisonment.' (Section 615 of the National Service Life Insurance Act of 1940)."

Premiums were paid on the reinstated policy through November 30, 1949, and it again lapsed for nonpayment of premium due on December 1, 1949. On February 6, 1950, the veteran executed another reinstatement application. [25] Question 10 on this application was the same as question 8 on the prior application and the answer made by the veteran was in the affirmative. Question 11 on the application was the same as Question 9 on the prior application and the answer of the veteran was in the negative. This form did not contain a question similar to Question 10 appearing on the prior application.

The evidence shows that the veteran applied for treatment on December 15, 1949, to be administered by a private physician, Dr. C. E. Suits, of Visalia. The record of treatment given under this authorization by the Veterans Administration is as follows:

"Office consultations and laboratory examinations.

"December 10, 1949.

"December 14, 1949.

"December 19, 1949.

"December 21, 1949.

"December 27, 1949.

"December 31, 1949.

“January 13, 1950.

“January 28, 1950.

“Treatment for the condition: Diabetes with adjunct diarrhea and hypertension.”

In the form authorizing the treatment by Dr. Suits, and which also contains his report, there was a finding by the doctor that the veteran had suffered from “Diabetes for 5 years, swelling of ankles and feet, upset stomach, occasional nocturia and chronic diarrhea for 6 months.” The diagnosis was “Diabetes, chronic diarrhea, mild hypertension.”

In the deposition of Dr. Suits, page 15, is this:

“Q. This then, diabetes with the complications mentioned would be, definitely, a progressive type of disease?

“A. Yes, it follows that course, it is gradually downhill.”

In that deposition, page 16, the doctor stated: [26

“Q. In 1949, on occasion of his first visit to you, do you recall the condition of his eyesight at that time?

“A. * * * I am sure his eyesight got worse, and, as I remember, there was definitely trouble in one eye at the time. I don't remember which eye, but it was possible for him to see and get around all right. Toward the end he practically had to be led everywhere he went.”

Page 29 of the deposition:

“Q. In that, the original examination, you stated

you did, did you also find diabetes mellitus, is that correct? A. Yes.

“Q. Would that have been a continuing condition from 1945?

“A. Yes, you don’t get over diabetes.”

Page 31 of the deposition:

“Q. (By Mr. Feierbach): * * * How much was John Willoughby told by you concerning his condition during the course of treatment?

“A. I think he knew the whole story. I am sure that he was told that he had diabetes and that he had kidney trouble. His wife was definitely told that he would, that it was not a very good outlook and that life expectancy was not too long.

“Q. You say he was told he had diabetes?

“A. He knew that.

“Q. He knew that?

“A. Long before he came to see me.”

This form of application contained substantially the same warnings or statements that appeared on the prior application, with the additional statement:

“I understand that statements made by me in this application are relied upon in reinstating insurance; that any deception or false statement either by inference, [27] omission, or otherwise may result in cancellation of the insurance or in refusal to pay a claim on the policy; and in either event, premiums are not returnable.”

The policy was reinstated by the Veterans Administration without medical examination as of July 1,

1948, based upon the statements of the veteran in the application.

The reinstated policy again lapsed on August 31, 1950, for failure to pay premiums. On October 19, 1950, the veteran made application for reinstatement and the questions 10 and 11 were the same and the answers were the same as on the second application. The same warnings were likewise contained on this form.

Because the last application was dated August 30, 1950, the veteran certified to the Veterans Administration as follows:

“I hereby certify that to the best of my knowledge and belief I was in as good health on October 18, 1950, as I was on September 1, 1950, the date of the first premium in default on my National Service Life Insurance account. Since the execution of the application, I have not been sick, or contracted any disease, or suffered any injury, or consulted a physician in regard to my health, or been prevented by reason of ill health or injury, from attending my usual occupation, and that I am now in sound condition mentally and physically, excepting as follows: * *

/s/ “JOHN R. WILLOUGHBY.

“December 1, 1950.”

The policy was reinstated without medical examination as of December 18, 1950, based upon the statements of the veteran in the application and the certificate.

The evidence discloses that the veteran, between August 31, and October 19, 1950, had received treatment at the Veterans Hospital in Fresno, and that he had been in a hospital for examination and study on November 1, 1950, in San Francisco, California. [28]

At the time the insurance lapsed on September 1, 1950, the veteran was a patient in the Fresno Veterans Hospital, having been admitted there on August 7, 1950, following hospitalization in the University of California Hospital for diagnostic study on July 28, 1950. On August 9, 1950, a physical examination report of the veteran disclosed that there was almost complete loss of vision of the left eye and partial loss of vision of the right eye with retinitis. The amount of insulin the veteran had been taking was increased, and he was given two blood transfusions. After a month's stay in the hospital he was discharged on September 9, 1950, as having attained maximum hospital benefit, and with a diagnosis of diabetes mellitus, severe, and glomerular nephritis, chronic, severe with azotemia.

Although the veteran was actually a patient in the Veterans Hospital in Fresno from August 7, 1950, to September 9, 1950, the application for reinstatement states that it was signed at Tulare, California. For some reason, the application was not mailed until October 18, 1950, and on December 1, 1950, he submitted the comparative health statement as of the October 18th date, which contained this statement: I have not been * * * prevented by reason of ill health or injury from attending my usual occupation,

and that I am now in sound condition, mentally and physically * * *."

The evidence discloses that the veteran was intelligent, and had had experience in conducting his own roofing business. Nothing appears in the record to justify any inference that the veteran was unable to understand the questions appearing on the applications or that he was in any way confused by the questions or their arrangement on the application forms. From the uncontradicted evidence, there is no question that the answers given to question 9 on the first application, and [29] question 11 on the second and third applications, were false. The only inference that can be drawn is that the answers to question 8 on the first application, and to question 10 on the second and third applications were likewise false, since the medical reports establish that the disease pursued a progressive course resulting in death on May 24, 1952. The veteran knew the progressive nature of the disease.

The representations made by the veteran concerning the state of his health and treatments by physicians and by hospitals were false, so known to the veteran. These representations relate to material facts and it must be presumed from the evidence that the statements were made with intent to deceive. The only problem relates to the reliance upon such statements by the Veterans Administration in reinstating the policy, since all of the information above set forth concerning medical treatment and hospitalization was on file with the Veterans Administration, and

an examination of such files would have disclosed that the veteran's statements were false.

At the time of the first reinstatement of the policy the veteran in answering Question 10 stated that he had applied for disability compensation, retirement pay, pension or waiver of insurance premiums. The report of Dr. Schlottstadt was on file with the Veterans Administration at that time. An examination by the Veterans Administration would have disclosed the truth as to the veteran's condition. Likewise, on the second and third reinstatements, an examination of the files would have disclosed the reports of Dr. Schlottstadt and of the Veterans Administration at Fresno, California. [30]

The government argues that the Insurance Section of the Veterans Administration is maintained at Oakland, and that the Claims Section is maintained at San Francisco, California, and that the information in the San Francisco office was not available at the Oakland office. If the Insurance Section had followed up the answer given by the veteran to Question 10 on the first application, the falsity of the veteran's statements would have been disclosed. This Court is bound by the language of the Court of Appeals in the Ninth Circuit in the case of *United States v. Kelley*, 136 F 2d 823. In the Kelley case, the veteran applying for government life insurance, made the following answers to Question 13 on the application:

13. Have you ever applied for (a) government insurance * * *? Ans. No. * * * (d) Pension? Ans.

Apparently someone in the "Insurance Section" had endorsed the "C-number" on the application. In the instant case, the veteran correctly answered Question 10 on the first application. In disposing of the government's contentions in the Kelley case, the Court stated at page 825 et seq. as follows:

"The evidence showed that both of Kelley's applications—his application for compensation and his application for insurance—were made to and acted upon by the Veterans Administration. With respect to such applications, the Veterans Administration was and is the agent of appellant. *United States v. Golden*, 10 Cir. 34 F 2d 367, 376. The evidence showed that, as such agent, the Veterans Administration received, considered and acted upon Kelley's application for compensation before receiving his application for insurance. Thus the evidence showed that appellant, by its agent, had full knowledge of the application for compensation, and, with such knowledge, granted the insurance. Therefore the evidence did not warrant, much less require, a finding that appellant relied upon or was deceived by the answer to question 13(a). [31]

"There is here no question of imputing to the Veterans Administration knowledge which it might have been able to obtain from the records of another Department of the Government. Kelley's application for compensation was a part of the Administration's own records. Its knowledge thereof was actual, not imputed, knowledge. Hence such cases as *United States v. Riggins*, 9 Circuit, 65 F 2d 750; *United*

States v. Depew, 10 Cir., 100 F 2d 725; and *Jones v. United States*, 5 Cir., 106 F 2d 888, cited by appellant, have no relevancy here.

“Appellant argues that Kelley’s application for insurance was considered and acted upon by the ‘insurance section’ of the Veterans Administration; that the ‘insurance section’ had no knowledge of Kelley’s application for compensation; and that therefore appellant could disclaim such knowledge. Cf. *Halverson v. United States*, 7 Cir., 121 F 2d 420, 422. The argument assumes that the ‘insurance section’ and the Veterans Administration are separate entities, and that, with respect to Kelley’s application for insurance, the ‘insurance section’ was appellant’s agent. These assumptions are unwarranted. The ‘insurance section’ of the Veterans Administration is not a separate entity, but is merely a function or activity of the Administration. Appellant’s agent was not the ‘insurance section’ of the Administration, but was the Administration itself.”

On motion to amend the opinion rendered by the court in the Kelley case, Chief Judge Denman, concurring in the denial of such motion, stated:

“The appellant moves a modification of the opinion’s holding that the Veterans Administration had notice of the filing of a claim for compensation by the appellee. Appellant urges that it cannot be charged with such notice because of the administrative difficulty in examining its files in the compensation section to determine whether the applicant had correctly answered question 13(a).

“There should be no such administrative difficulty if the files are properly kept. If they are not, such failure should not prejudice the veteran’s widow any more than it would prejudice the veteran’s widow suing the Equitable Life Insurance Company with a vastly greater volume of life insurance and compensation business than that of the Veterans Administration. If properly indexed it would not [32] take an hour’s search of the files to determine whether a compensation claim had been filed. One can imagine the short shrift we would give to a similar plea of the Equitable Life if the question had been whether the insured under a life policy had filed with that company a claim for compensation for total disability.”

This Court is constrained, under the language of the Kelley case, to hold that the government was not warranted in relying on the false statements contained in the applications for reinstatement, when the files of the Veterans Administration contain the true information.

Were it not for the Kelley case, this Court would adopt the reasoning contained in the decision of the Circuit Court of Appeals of the District of Columbia in the case of *United States v. Kieffer*, 228 F 2d 44, 1956, and would uphold the defenses of fraud set forth in the answer of the government.

Judgment is ordered for the plaintiff in accordance with the prayer of her complaint, and counsel for the

plaintiff is directed to lodge with the Clerk of this Court findings of fact, conclusions of law and form of judgment, not inconsistent with the views herein expressed.

The Clerk of this court is directed to forthwith mail copies of this order and memorandum to counsel for the parties.

/s/ GILBERT H. JERTBERG.

Dated: July 31, 1956.

[Endorsed]: Filed July 31, 1956. [33]

United States District Court, Southern District
of California, Northern Division

No. 1448-ND

HELEN McCARTHY WILLOUGHBY,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND JUDGMENT

The above-entitled action came on for trial before the Court, sitting without a jury, the plaintiff appearing in person and by her attorney, Adolph

Feierbach, Esq., of Visalia, California, and the defendant appearing by its attorney, Andrew J. Davis, Esq., of Los Angeles, California, Assistant U. S. Attorney, representing Laughlin E. Waters, Esq., United States Attorney for the Southern District of California, and evidence both oral and documentary having been introduced and received by the Court, and said matter having been argued before the Court both orally and by written briefs and thereafter submitted to the Court for its decision, and the Court being fully advised in the premises, makes these, its

Findings of Fact

I.

That the defendant, on or about September 1, 1944, duly issued to one John R. Willoughby, a member of the Armed Forces of [34] the United States, to whom was assigned Serial Number T184-054, a policy of Life Insurance in the principal sum of ten thousand and no/100 (\$10,000.00) dollars, being National Service Life Insurance Policy number 17,587,396, in which the plaintiff above named was designated as sole beneficiary.

II.

That on September 28th, 1944, said John R. Willoughby cancelled said designation of beneficiary and executed a new designation naming plaintiff as primary beneficiary and the wife of said John R. Willoughby as secondary beneficiary

III.

That all premiums required to be paid under the terms of said policy between the date of issuance thereof, and the date of death of said John R. Willoughby were paid and received by defendant.

IV.

That said John R. Willoughby was retired with the rank of Flight Officer in November, 1945, on account of illness, to wit, diabetes mellitus; that the Army Retiring Board found that said John R. Willoughby was incapacitated for active service and that said incapacity was the result of an incident of service, namely diabetes mellitus.

V.

That said John R. Willoughby died at the Veteran's Hospital, Fresno, California, on May 12, 1952, as a result of the progression of said disease, diabetes mellitus; that said hospital was and is maintained by an agency of defendant, to wit, the Veterans' Administration.

VI.

That the primary beneficiary, namely Helen McCarthy Willoughby, plaintiff herein and mother of John R. Willoughby, survived him and made due application, on or about October 15, 1952, to said Veterans' Administration for payment to her of the [35] proceeds of said policy of life insurance; that on or about March 25, 1953, said Veterans' Administration denied plaintiff's claim and refused to pay said proceeds; that thereafter plaintiff ap-

pealed said decision to the Veterans' Board of Appeals, and on August 19, 1953, said appeal was denied.

VII.

That said insurance policy lapsed for non-payment of premiums on each of the following dates:

- (1) October 1, 1947.
- (2) December 1, 1949.
- (3) September 1, 1950.

That as to each of said lapses, said John R. Willoughby made applications for reinstatement without medical examination, upon the following dates

- (1) July 12, 1948 (as to lapse of October 1, 1947).
- (2) February 6, 1950 (as to lapse of December, 1949).
- (3) October 19, 1950 (as to lapse of September 1, 1950).

and in each of said applications and in a supplementary certificate dated December 1, 1950, the said John R. Willoughby represented (a) that he was in as good health as he was on the due date of the first premium in default, (b) that he had not been ill, or suffered or contracted any disease, injury or infirmity, or been prevented by reason thereof from attending his usual occupation, or consulted a physician, surgeon, or other practitioner for medical advice or treatment at home, hospital or elsewhere, in regard to his health since lapse of said insurance. That each and all of said applica-

tions for reinstatement were granted by the said Veteran's Administration, and said policy was, at the time of his death so reinstated with premiums paid to date.

VIII.

That each and all of said representations set forth in the preceeding paragraph (designated (a) and (b)) were untrue, and known by said John R. Willoughby to be untrue, and they and each of them were material facts; that it must be presumed they were made [36] with intent to deceive.

IX.

That in his application for reinstatement, made July 12, 1948, said John R. Willoughby answered in the affirmative, the following question: "Have you ever applied for disability compensation, retirement pay, pension or waiver of insurance premium?" being question numbered 10, therein.

That an investigation of this answer in his said application by defendant's agent would have revealed the true state of the veteran's health.

That it is further true that said John R. Willoughby made written application to the said Veterans' Administration on May 25th, 1948, for medical treatment, which was granted, and he received such treatment, at the expense of the Veterans' Administration (for diabetes mellitus) from May 18th, 1948, through June 30, 1948, and from the time to time thereafter, up until the time of his death; that the records of said application for disa-

ability compensation, etc., and of the disability and illness of John R. Willoughby, and the treatment thereof by physicians authorized by the Veterans Administration to administer it, were on file with the Veterans' Administration at the time of receipt by them of each of said applications for reinstatement.

X.

That the true facts concerning the state of health and medical treatment of said John R. Willoughby were known to said Veterans' Administration at the time of granting each of said applications for reinstatement, and the Court finds therefore that the action taken by said Veterans' Administration in granting the same was not taken in reliance upon the said false representations; that in acting upon said applications, the said Veterans' Administration was at all times acting as the agent of the defendant herein; that the defendant granted said applications with actual [37] knowledge of his condition of health and that he was under treatment therefore by physicians, said information being part of the records of defendant's agent.

XI.

That the Veterans' Administration is one agency and is not separated into separate entities; that the "Insurance Section" and "Claims Section" of said Veterans' Administration are functions of the same agency, to wit: of Veterans' Administration and the notice to our knowledge of one of said "sections"

is notice to and knowledge of said Veterans' Administration.

XII.

That Adolph Feierbach, Esq., attorney for plaintiff, has performed services in the prosecution of plaintiff's claim having the reasonable value of ten per cent (10%) of the amount of her recovery.

Conclusions of Law

I.

The Veteran's Administration, at all times described in the foregoing findings of fact, was the agent of the defendant, The United States of America. (United States vs. Golden, 10 Cir. 34 F 2d, 367,376.)

II.

That the defendant, by its said agent, had actual knowledge of the true information concerning the state of health of said John R. Willoughby, deceased, at the time of acting upon and granting his said applications for reinstatement of his policy of National Service Life Insurance and it did not rely upon the false representations of the veteran, John R. Willoughby, in reinstating his insurance. (United States vs. Kelley, 136 F 2nd 823.)

III.

That National Service Life Insurance Policy Number 17,587,396, in the principal sum of Ten Thousand (\$10,000.00) Dollars written upon the life of John R. Willoughby, Deceased, was [38] in full force and effect at the time of his death on May 12,

1952, and the proceeds thereof were then and there due and payable to his primary beneficiary, Helen McCarthy Willoughby, plaintiff herein.

IV.

That the attorney for plaintiff, Adolph Feierbach Esq., of Visalia, California, is entitled to a fee of ten per cent (10%) of the amount recoverable by plaintiff, and to be paid direct to him by the Veterans' Administration out of the sums awarded to plaintiff. (38 U.S.C.A. 551, Taylor vs. U. S., 115 Fed. Sup. 143,153.)

V.

That plaintiff herein is entitled to judgment against the defendant for the principal sum of ten thousand (\$10,000.00) dollars.

Judgment

In accordance with the foregoing Findings of Fact and Conclusions of Law, it is ordered, adjudged and decreed:

1. That plaintiff herein, Helen McCarthy Willoughby, do have and recover of and from the defendant, the United States of America, the sum of ten thousand (\$10,000.00) dollars.

That out of said sum payable to plaintiff, there be paid direct to Adolph Feierbach, Esq., Attorney at Law, Visalia, California, and deducted from the sum payable to plaintiff, ten per centum (10%) thereof.

Dated: November 16th, 1956.

/s/ GILBERT H. JERTBERG,
United States District Judge.

Lodged November 15, 1956.

[Endorsed]: Filed November 16, 1956.

Docketed and entered November 21, 1956. [39]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO COURT OF
APPEALS FOR THE NINTH CIRCUIT

Notice Is Hereby Given that the defendant,
United States of America, hereby appeals to the
United States Court of Appeals for the Ninth
Circuit from the final judgment entered in this
case on November 21, 1956.

Dated: January 16, 1957.

LAUGHLIN E. WATERS,
United States Attorney;

MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief, Civil Division;

/s/ HIRAM W. KWAN,
Assistant U. S. Attorney,
Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 16, 1957. [41]

In the United States District Court, Southern
District, of California, Northern Division

No. 1448-ND-Civil

HELEN McCARTHY WILLOUGHBY,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Honorable Gilbert H. Jertberg, Judge Presiding.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

February 9, 1956

Appearances of Counsel:

For the Plaintiff:

ADOLPH FEIERBACH.

For the Defendant:

LAUGHLIN E. WATERS,

United States Attorney, by

ANDREW J. DAVIS,

Assistant United States Attorney.

HELEN McCARTHY WILLOUGHBY

the plaintiff, called as a witness and having been first duly sworn, was examined and testified as follows:

* * *

Direct Examination

By Mr. Feierbach: [4*]

* * *

Q. Will the Clerk show the witness Government's Exhibit B?

A. Yes, I am acquainted with this form. [11]

Q. And that is a form for application for reinstatement?

A. Nonmedical.

Q. Do you know the procedure whereby those forms were received by the Veterans Administration?

A. Yes.

Q. And can you describe that?

A. This form was received in the premium accounting section, and went directly to the accounting clerk that handled the insurance records for this number, I should say the premium accounting records for this number, and if the application was answered yes and no to questions 10 and 11, and the emittance was sufficient to reinstate the insurance, and it was signed by the applicant, and there was nothing irregular on its face, the clerk would reinstate the insurance, stamp this form "reinstated" and send it to file, and then send a release to the insured.

(Testimony of Helen McCarthy Willoughby.)

Q. Did the Veterans Administration send the unexecuted form to the insured?

A. Yes. We were responsible for releasing this form to the insured if insurance had lapsed.

Q. Can you describe the procedure whereby one of these forms would be sent to an insured person?

The Court: Well, are you referring now to the application?

Mr. Davis: To the application for [12] reinstatement.

A. Once a month we had the clerks scan their accounts, and any account in which a remittance had not been received during that month and which was due, they would certify those records and prepare the letters to the insured.

The Court: And did you enclose a form of application to reinstate?

The Witness: That is right, we attached this form 353-a.

The Court: In duplicate?

The Witness: No, we only attached the one copy and we noted in our records that we had sent out the notice.

The Court: And then if the application was regular on its face, as you have indicated, you would stamp, or somebody would stamp "reinstated," is that correct?

The Witness: That is correct.

The Court: Then what, if anything, in that remained a part of the files of the section? Is that right?

(Testimony of Helen McCarthy Willoughby.)

The Witness: That is right, it went to the insurance file in our section. [13]

* * *

DR. MANIFEE McDONALD

called as a witness by the defendant, having been first duly sworn, was examined and testified as follows:

* * *

Direct Examination

by Mr. Davis: [15]

* * *

Q. Doctor, are you acquainted and have you studied the disease known as diabetes mellitus?

A. I have, yes.

Q. And how does one become afflicted with that disease?

A. The answer to that is unknown. It is not known what, except in unusual cases—the usual cases of diabetes, the cause of it is not known.

Q. Is it a hereditary type of disease?

A. Heredity is involved in its appearance in my [16] particular patient, yes.

Q. Do individuals in any particular occupation acquire diabetes mellitus?

A. No. It is not an occupational—occupation doesn't represent a hazard.

* * *

(Testimony of Dr. Manifee McDonald.)

Cross-Examination

By Mr. Feierbach: [17]

* * *

The Court: Doctor, for the record, will you explain in layman's language what you mean by diabetes and what you mean by mellitus?

The Witness: Well, there are two diseases labeled with the general term diabetes. Diabetes means sweet urine. In one kind, which we are not dealing with, it is a disease in which very large amounts of urine are passed; it is quite [21] rare. The type we are speaking about—no, wait a minute, let me back up a little. Diabetes means much urine. Diabetes insipidus is weak urine, or a lot of urine. That is the end of that one.

Diabetes mellitus is sweet urine, sugar in the urine. It is classed as a metabolic disease in that the disease is a disorder of the metabolism involving primarily the sugars or carbohydrates in the body, secondarily involving the other things we eat, protein and fat. The disease manifests itself as an abnormal elevation of the blood sugar with secondary spillage of sugar into the urine. The body cannot handle sugars correctly, they are lost, other foods must take their place, take the place of sugar, and the secondary bad effects are due to abnormal metabolism, to try to make up for this defect. It is a difficult disease to define, because, as I say, we don't know its cause. Its effects are felt in many

(Testimony of Dr. Manifee McDonald.)

places in the body. Ten years ago it was a simple disease to find, but we know a little more about it and we don't know as much as we thought we did.

The Court: And does it, if not corrected, produce this degeneration you mentioned, other disorders?

The Witness: Yes. Now we are getting into the field of disagreement among doctors, your Honor. Some of these degenerative disorders come on—some doctors say these degenerative disorders come on no matter how well the patient [22] is treated, it still depends on the particular patient. We can't say for sure. Other doctors, who are authorities in the field, who have devoted their lives to the subject, strongly believe and write and say in loud voices that there will be a minimum or none of these degenerative disorders in a patient who is well controlled as far as the diabetes goes, that is, no sugar spilling most of the time, for twenty or thirty years. The arguments are not settled.

The Court: Well, I have known many people over the years, I think, who have been on some sort of insulin treatment and diet and they have gotten along very well for a period of many years.

The Witness: That is very true. Insulin is used in most diabetes in addition to the diet to help control, to help level off this flood sugar at a normal or near normal level. [23]

JOHN J. McDONAGH

called as a witness by the defendant, having been first duly sworn, was examined and testified as follows: [26]

* * *

Direct Examination

By Mr. Davis:

* * *

Q. Was Mr. Willoughby a patient at the hospital?

A. Yes, he was. Our records show Mr. Willoughby was admitted to the Veterans Administration Hospital, Fresno, California, on August 7, 1950, at 9:30 a.m., and was discharged on September 9, 1950. [27]

* * *

The Witness: 9th. He was readmitted again May 21, 1952, and expired May 24, 1952. There are no other admissions to this hospital.

Q. (By Mr. Davis): He was continuously a patient in your hospital, or at the hospital from August 7, 1950, to September 9, 1950?

A. For a period of 33 days, yes, sir. I believe there was no leave or pass given that I know of.

Q. Does your record show what type of treatment he received? A. Yes, sir, it does. [28]

* * *

Q. Is there any summary of the treatment he received?

A. Yes, there is a summary on the first period

(Testimony of John J. McDonagh.)

of hospitalization, which is made on all the patients, which is called a discharge or narrative summary, and there is also a summary covering the entries of the hospital.

Q. Would you read for the record the summary for the first period of hospitalization?

A. This summary is broken down into several parts. First, is "Present illness: This patient was admitted to this hospital with the following complaints, loss of energy, weakness, loss of vision left eye, partial loss of vision right eye. While in service in 1946 he became tired, weak and thirsty. [29] He reported to the flight surgeon and found that he had diabetes. He was hospitalized at DeWitt General Hospital for two months and retired from the Army. About one year ago, he was fairly well controlled and he became more fatigued, his ankles and legs began to swell, and his diabetes became harder to control. For the past six months, he has been under the care of a general practitioner, and inasmuch as his albumin remained 4 plus all the time and his blood sugar high, and inasmuch as he had retinal hemorrhages with loss of vision in the left eye, and inasmuch as he had a hemoglobin of 25 to 50, he was sent to the University of California Hospital where he remained for diagnosis. He was admitted to the University of California Hospital July 28, 1950, for diagnostic study. At the UC Hospital, the patient was found to have a high glucose tolerance. The fundi showed large recent and old hemorrhages and punctate hemorrhages of

(Testimony of John J. McDonagh.)

both retinae. He was found—and there are stricken two words, to have—on urine examination, to have a fixed urine specific gravity, excretion of 8 grams of albumin and 61,000,000 red blood cells a day with occasional hyaline casts. The PSB excretion was 13% in 13¼ hours. The NPN was 71.5.”

The next paragraph is entitled: “Physical Examination: This 31-year-old ex-pilot, a present roofing contractor, was examined on August 9, 1950. Height, 72½. Weight, 158. [30] Blood pressure, 160/90. Patient appears slightly pale and asthenic. He is fairly intelligent and understands his medical problem. Examination of the eyes revealed practically complete loss of vision in the left eye, marked retinitis. Partial loss of vision of right eye with retinitis, also. Examination of the heart and lungs was normal. Palpation and hammer percussion over both kidneys elicits no tenderness.”

The next paragraph is entitled: “Laboratory and X-Ray Findings: Urinalysis: Specific gravity, 10.5. Albumin, 4 plus. Field covered with a morphourates—8-8-50. 8-22-50, specific gravity, 10.6. Albumin, 3 plus. Microscopic: Many bacteria in morpuous material, occasional red blood cells. 8-8-50, blood sugar 270 mgms. per 100. NPN 88½ mgms. per 100. 8-11-50, total protein, 8.6 grams per 100. 8-22-50, NPN, 108. Hematology: 8-8-50, white count, 10,250. Red count, 3,190,000. 8-22-50, white count, 10,150. Red count, 3,890,000. X-ray of the chest was clear.”

The next paragraph is entitled: “Course in the Hospital: The patient”—then there are six words

(Testimony of John J. McDonagh.)

deleted in ink which are, was put on insulin, or, rather—"was continued on his insulin, similar to the treatment received at the University of California Hospital. He was given 15 units of insulin before meals. This was varied, according to the results of urinalysis, being increased to 20 or 25 before meals. Two transfusions of 500 cc whole blood each were given during [31] the patient's stay at the hospital. The patient was put on a low salt diet of 2,400 calories. Patient was given seconal when necessary for sedation. After the patient's stay in the hospital for about a month, his diabetes was fairly well controlled. The patient was more comfortable and had very few complaints. Inasmuch as no further treatment was indicated, the patient was recommended for discharge."

Then we have following that several short paragraphs. "Discharge Status: MHB. Discharge medication: None. Follow-up: None.

"Diagnoses: 1. Diabetes, Mellitus, severe.

"Diagnoses: 2. Glomerulus nephritis"—it is two words here—"chronic, severe; with azotemia.

Service-connected status: Unchanged. This examination was not for rating purposes." [32]

* * *

Cross-Examination

By Mr. Feierbach:

* * *

Q. Just one question before you start to read: These are records of the Veterans Administration,

(Testimony of John J. McDonagh.)

are they not? [33] A. Yes, they are.

Q. The total records of the Administration?

A. Yes, these are retained, however, at our hospital.

Q. You are going to read it?

A. This summary is for the second period of hospitalization, entitled "Narrative Summary"—no, "Final Summary."

Date of admission, 5-21-52. Date of discharge, 5-24-52 (Died). Number of days hospitalized 3.

First paragraph under the heading of "present Illness: This 33-year-old white male adult, a known case of diabetes for six years and chronic nephritis for about three years, was admitted on 5-21-52 with symptoms of advancing anemia and progressive deterioration in his general condition for the past three months. Diabetes mellitus dates back to 1946 while in the service. He has been taking insulin for this since, more recently in three doses daily. 2½ years ago following the onset of fatigability, pedal edema and blindness, he was hospitalized at the University of California Hospital where urinalyses revealed specific gravity to be fixed, quantitative albumin excretion 8 grams in a day, and Addis count 61 million red cells with occasional hyaline casts. PSP excretion was 13% in two hours. NPN was 71.5. They felt that he was a case of chronic glomerulonephritis with severe renal failure as well as diabetes mellitus. He was hospitalized here during the summer of 1950. Blood [34] pressure at

(Testimony of John J. McDonagh.)

that time was 160/90. He was somewhat pale. Heart and lungs were not remarkable. NPN varied from 88 to 108. Red count was from 3,190,000 to 3,890,000. Chest X-ray was negative. Urine showed fixed specific gravity with 3 plus albumin. Blood sugar was 270. Microscopic urinalysis revealed occasional red blood cells. He received two blood transfusions here and was treated with a low salt diet. Insulin was given three times daily before meals, usually 15 units per dose. Following his discharge here, he was cared for by his local physician receiving liver injections, iron, vitamin preparations in an attempt to control his anemia. There was gradual improvement to December of 1951 when he was feeling somewhat stronger. His blood pressure was said to be normal at that time. He received a transfusion in March, 1951, and again in June, 1951.

"In February, 1952, patient developed symptoms of influenza, was hospitalized and received two blood transfusions as well as antibiotics. He recovered somewhat but after leaving the hospital, his condition has gradually deteriorated to the time of admission. During the three weeks before admission, this was particularly noticeable. Symptoms included nausea, frequent vomiting, intermittently poor appetite, loss of strength, fatigability, weakness, and insomnia. He stayed on a low salt diet. He stated that there was development of mild edema of his extremities on prolonged [35] standing with rapid diminution on reclining. He has also complained of occasional irregular heart action with

(Testimony of John J. McDonagh.)

palpitation and skipped beats. This is a relatively new symptom, during the past several weeks. System review and past history revealed no significant nocturia, moderate exertional dyspnea probably related more to the status of his hemograph, nocturnal dyspnea for the past three weeks though not severe. He has received no digitalis or mercurial diuretics in the past. Two years ago he became blind in the right eye and developed poor vision in his left eye. These occurred suddenly following retinal thromboses. There is a history of hives during childhood and more recently he has been told he had hay fever."

The next paragraph is entitled "Physical Examination: Revealed a well-developed, well-nourished, young, white, male adult who is conscious, co-operative and rational and who appeared acutely and chronically ill. He is well oriented, appeared extremely intelligent and had good grasp of memory. There was no apparent dyspnea, orthopnea, cyanosis, edema or petechiae. The pertinent physical findings included minimal neck vein distention, both pupils regular, the right slightly greater than the left, and the right not reacting well to light. Conjunctivae showed 3 plus pallor. Lung fields were clear. The heart appeared somewhat enlarged to the left. The PMI was felt midway between the [36] mid clavicular and anterior axillary line in the 5th left intercostal space. On admission the heart was irregular with a moderate pulse deficit of some 20 beats. The following morning, heart rate and

(Testimony of John J. McDonagh.)

rhythm were regular at 110 per minute. Blood pressure was 145/88. There was a Grade I soft systolic murmur at the apex. The abdomen was negative. Neurological examination was not remarkable. The remainder of the physical examination was within normal limits."

The next paragraph is entitled "Laboratory Work: Admission urines revealed on two occasions, specific gravity 1005, albumin 4 plus, and 2 plus, and urines for sugar were negative. Microscopic examination of the urines revealed on 1 occasion many granular casts, 50 WBC, and 5-10 RBC. On the 2nd occasion, essentially the same findings. Red counts 2,110,000, hematocrit 20, sedimentation rate 14 corrected. White count 10,350 with polys 73%. NPN was 77 mg. %."

The next paragraph is entitled "Tentative Diagnosis: Chronic glomerulonephritis."

The next paragraph is entitled "Course in Hospital: Patient was in the hospital 3 days before expiration. It was felt that the patient represented a rather advanced stage of chronic glomerulonephritis but that his anemia was probably responsible for much of the symptomatology at [37] this time. It was, therefore, decided to transfuse the patient. The first day in the hospital, the patient received the same insulin dosage he had been taking on the outside, namely, 15 units, 10 units, and 10 units of regular insulin before the three meals. He had slight insulin reaction in the late afternoon of the 1st day and the insulin dosage was then cut to

(Testimony of John J. McDonagh.)

5 units before each meal from there on. On the 2nd hospital day, the patient received 500 cc of blood by transfusion. About an hour after the end of the transfusion he complained of some tightness in his chest with some difficult respirations. Six minims of epinephrine relieved this fairly well. EKG revealed sinus tachycardia and left ventricular hypertrophy. Early in the morning of 5-24-52, patient became quite dyspneic, pulse became poor and weak, and skin became cold and moist. Patient complained of constricting feeling about the chest. Emergency EKG revealed ventricular tachycardia. Blood pressure was unobtainable. Pronestyl intravenously in the dose of 600 mg. total over a period of about 40 minutes was ineffectual in halting this arrhythmia and patient was pronounced dead at 7:45 a.m., 5-24-52. A post-mortem examination was done.

“Diagnosis: 1. Diabetes mellitus, treated, died. 2. Chronic glomerulonephritis, treated, died. 3. Arteriosclerotic heart disease, treated, [38] died. 4. Infarction of myocardium due to arteriosclerotic coronary thrombosis manifested by ventricular paroxysmal tachycardia.”

Diagnosis No. 5, which has been deleted in ink, “Hypertensive cardiovascular disease secondary to dg. No. 2.” [39]

WILLIAM G. DENARDO

a witness for the defendant, having been previously duly sworn, resumed the stand, and was examined and testified further as follows:

* * *

Direct Examination
(Continued)

By Mr. Davis:

Q. Mr. Denardo, I am going to show you Plaintiff's Exhibit I, and ask you if you are familiar with the type of form, which appears photostated thereon? A. Yes, I am.

Q. And did your section regularly handle that type of form? A. Yes.

Q. And can you describe what it is and what it was used for?

A. This is what we call the premium record card, on which we posted all remittances received for the insurance, and it indicated the status of the insurance.

Q. When premiums were paid, it would be posted on these cards?

A. That is right. There is a column here, "Last month [40] paid," and we would post remittances and show the last month for which it was paid.

Q. Now, those cards there show which insured the cards refer to?

A. Well, this record is for John R. Willoughby, Number 17587396.

(Testimony of William G. Denardo.)

Q. From those cards can you tell if Mr. Wiloughby's insurance lapsed at any time?

A. Yes.

Q. And did it lapse more than once?

A. Yes, reading this card it lapsed three times.

Q. What was the first lapse?

A. The first time it lapsed was November, 1949, nonpayment of premium. Excuse me.

Q. Is that the second time, or the first time?

A. No, the first time it lapsed was September, 1947, nonpayment of premium.

Q. Was it reinstated on that occasion?

A. It was reinstated, nonmedical reinstatement, July 12, 1948.

Q. What is the next lapse that appears in the record?

A. The insurance was paid to November, 1949, when it lapsed for nonpayment of premium.

Q. Was the insurance reinstated on that occasion?

A. Yes, it was reinstated with a nonmedical reinstatement [41] form 353 on February 8, 1950.

Q. What was the next lapse?

A. The next lapse was August, 1950.

Q. Was it thereafter reinstated?

A. Yes, it was reinstated with a nonmedical reinstatement form on October 15, 1950.

Mr. Davis: May I see Defendant's F, G, H?

The Court: Was there a period of a year in which the policy could be reinstated for nonpayment of premium?

(Testimony of William G. Denardo.)

The Witness: Well, at the time the policy could be reinstated, there was no limitation.

The Court: In other words, if the policy had lapsed for nonpayment of premium and that covered a two-year period, or three, the veteran could make application and forward the proper premiums covering that period, then on the nonmedical reinstatement it would be reinstated, is that right?

The Witness: That is right, and subsequently, and I don't know at which date it changed, that rule only applied for a 90-day period, but for a certain period of time there was no limit. That was immediately after the war, but after things were organized it was changed back to the 90-day period.

The Court: Yes, but these reinstatements were all made within that 90-day period, I assume? [42]

The Witness: Well, the first one wasn't, but the second one was, and the third was within the 90-day period.

Q. (By Mr. Davis): Mr. Denardo, I show you Defendant's Exhibits B, C, D and E. You have testified this morning with reference to Exhibit D, I believe, is that correct? A. That is correct.

Q. The Exhibits B and C also represent reinstatement application forms, and were those handled the same as was the procedure when Exhibit D was being processed? A. Yes.

Q. Now, you testified this morning that if the documents appeared regular and the proper answers appeared on the face of the reinstatement ap-

(Testimony of William G. Denardo.)

plication, the clerk stamped the application reinstated, is that correct? A. Yes.

Q. What was the procedure if the question relating to comparable health and visits to physicians and hospital were answered which would indicate the comparative health was not as good or that the veteran had visited a doctor or physician?

A. Well, the premium review clerks in my section were not authorized to handle such reinstatement, and they would send them with the insurance file to the insurance medical section for processing, and then if it [43] was approved, it would be returned to the premium review clerk for handling.

Q. Your section then was only authorized to reinstate if the answers appeared in regular form?

A. Yes and no to the two questions. Any variation of that, or any statement under that illness block, why, we would have to recheck them.

Q. At that time you would send it to a different section, the insurance section?

A. Insurance medical section.

Q. Medical. And you are not acquainted with the procedure in that section?

A. No, that was a different division.

Q. Thereafter if the form was returned to you from the medical section, what would appear stamped on the form?

A. Well, it would come back either stamped "acceptable" and it was signed by one of the doctors, or one of the members, I should say, of the medical section; or they had a covering form that they

(Testimony of William G. Denardo.)

would attach to the reinstatement, advising we could reinstate; or, thirdly, it would be stamped "rejected" or a word similar to that, they did not accept it.

Q. Did you review the insurance folder contained in the Veteran's file this morning?

A. Yes, sir.

Q. And was there any medical evidence or information [44] contained in that portion of the file?

A. Not in the insurance portion of the file. [45]

* * *

Q. Mr. Denardo, I am going to show you Government's Exhibit J, and ask you if you recognize the document?

A. Yes, I do.

Q. Would you state what it is?

A. This is the operating manual for the premium accounts unit.

Q. And that covered your section, did it, of the Veterans Administration?

A. This covered some of the units of my section.

Q. Did that provide for the procedure to be followed in processing reinstatement applications?

A. Yes.

Q. Can you point to the portions of the operations manual which refer to the reinstatement of insurance?

A. In this Change 16, dated August 16, 1948, page 115, covered the handling of reinstatement applications.

(Testimony of William G. Denardo.)

Q. And what specific portion of the page covers it? Is there a numerical reference?

A. There are a few, and the entire page covers it, but I think the pertinent ones are items 7 and 26, here.

Q. And when you were chief of the premium accounting section, you were governed by this manual, is that correct? A. Yes. [48]

* * *

Cross-Examination

By Mr. Feierbach: [49]

* * *

Q. Your office would handle requests for waiver of insurance premiums?

A. No, the insurance service would, and the portion of my section, we kept the insurance folder, attached the folder to the waiver for insurance premiums, which was forwarded to the disability claims division.

Q. You had access to the disability files of the Veterans Administration?

A. There was actually no disability file.

Q. If a man should apply for disability compensation, isn't there a division of the Veterans Administration that handles that?

A. I think you have reference to what they call the "C" file.

Q. Which is it? A. The "C" file.

Q. What is that?

(Testimony of William G. Denardo.)

A. In that file, they are live cases, applications for compensation—well, just like that. That is the main function of that file, and that is maintained in the regional [50] office.

Q. Well, you say you handled some applications for compensation. What type of compensation is that?

A. No, we handled the applications for waiver of premium; but applications for compensation were handled by the regional office.

Q. Well, what kind of compensation is that?

A. The ones handled by the regional office?

Q. Yes.

A. If a person is disabled or wants to be admitted to a hospital.

Q. I see. Would the initial request come into your office first, so that you could attach the insurance file to it, and forward it over to that office?

A. No. I was in insurance service. We were not part of the regional office.

Q. Well, what were you referring to when you said you received certain requests and attached them to the insurance folder and forwarded them?

A. Applications for waiver of premiums.

Q. Oh, waiver of premiums only? A. Yes.

Q. When you received an application for reinstatement, and the answer to question 10, I am speaking of the form used in 1948, when the application stated "yes" in answer to [51] question 10, what was the procedure of your office?

(Testimony of William G. Denardo.)

A. Could I please have one of the exhibits, that have that?

Q. That, I believe, is Exhibit B, Mr. Clerk. You are looking at Defendant's Exhibit B, which is dated July 12, 1948. Question 10, have you ever applied for disability compensation, retirement pay, pension or waiver of insurance premiums, to which Mr. Willoughby answered "yes." What is the procedure of the insurance section on receiving such an application for reinstatement?

A. On this particular application there was another portion to that question, that is "C-No." and no C-number was shown, and therefore we processed it. Now, if a C-number were shown, I would not be sure of the procedure at this time. I don't remember. There is a doubt in my mind whether we would handle it or not.

Q. Wouldn't you deem from reading the answer to that question that perhaps Mr. Willoughby was under some type of disability?

A. It would infer that, but there is no C-number shown, and it could be retirement pay from one of the armed services.

Q. You, of course, had access to the file where that C-number could be obtained?

A. No, those files were not maintained in our office [52] in Oakland.

Q. Not in your office, but suppose a C-number were shown, you would go to the office where the files were kept?

A. Well, I don't remember the procedure, but

(Testimony of William G. Denardo.)

in the event we would not have processed such an application, it would have been sent to the medical section, and they would have ascertained—or they would have obtained the C-file if they requested it. I don't remember the procedure.

The Court: Let me ask you, Mr. Denardo, the Oakland office is how designated?

The Witness: Veterans Administration, Insurance Branch No. 12.

The Court: And where was the regional office?

The Witness: Well, we had regional offices in San Francisco and Los Angeles. They are maintained in most principal cities.

The Court: I see.

The Witness: And I believe that the regional office nearest the veteran's home maintained the C-file.

The Court: So the regional office in this case would be either San Francisco or Los Angeles?

The Witness: That is right, if he resided in California. If he resided on the west coast, then the insurance office would keep the insurance [53] records.

* * *

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled cause:

A. The foregoing pages numbered 1 to 52, inclusive, containing the original:

Complaint;

Answer to Complaint;

Pre-Trial Stipulation (marked as Defendant's exhibit "A");

Order for Judgment;

Findings of Fact, Conclusions of Law & Judgment;

Notice of Appeal;

Statement of Points;

Designation of Contents of Record on Appeal;

Designation of Contents of Record on Appeal (by appellee);

Stipulation & Order Thereon Extending Time to Docket Record on Appeal;

and a full, true and correct copy of Notification of Entry of Judgment;

B. 1 volume of reporter's Official Transcript of Proceedings for February 9, 1956;

C. Plaintiff's Exhibits 1 through 14, inclusive, and Defendant's exhibits A through P, inclusive.

I further certify that my fees for preparing the foregoing record amounting to \$1.60, has not been paid by appellant.

Witness my hand and the seal of said District Court, this 21st day of March, 1957.

JOHN A. CHILDRESS,
Clerk;

By /s/ CHARLES E. JONES,
Deputy.

[Endorsed]: No. 15504. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Helen McCarthy Willoughby, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Northern Division.

Filed April 1, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

C. A. No. 15504

UNITED STATES OF AMERICA,

Appellant,

vs.

HELEN McCARTHY WILLOUGHBY,

Appellee.

STATEMENT OF POINTS

Appellant, United States of America, presents the following points upon which it intends to rely on appeal:

1. The District Court erred in holding that National Life Insurance Policy No. 17,597,396 was in full force and effect at the death of John R. Willoughby and that the proceeds thereof were then due and payable to plaintiff.

2. The District Court erred in holding that, in approving the insured's application for reinstatement of insurance, the Insurance Section of the Veterans Administration is chargeable with actual notice of facts contained in the files of the Administration's Claims Section.

3. The District Court erred in holding that the Veterans Administration did not rely upon applicant's false and fraudulent material statement of

comparative health when it reinstated the insured's lapsed National Service Life Insurance Policy.

4. The District Court erred in failing to hold that the reinstatements of the insured's National Service Life Insurance Policy were obtained as a result of the insured's false and fraudulent misrepresentations.

Dated: March 29, 1957.

LAUGHLIN E. WATERS,
United States Attorney;

RICHARD A. LAVINE,
Assistant U. S. Attorney,
Chief, Civil Division.

MELVIN RICHTER and
SEYMOUR FARBER,
Attorneys Department of
Justice.

/s/ HIRAM W. KWAN,
Assistant U. S. Attorney,
Attorneys for Appellant.

[Endorsed]: Filed March 30, 1957.

No. 15504

**In the United States Court of Appeals
for the Ninth Circuit**

UNITED STATES OF AMERICA, APPELLANT

v.

HELEN MCCARTHY WILLOUGHBY, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA, NORTH-
ERN DIVISION

BRIEF FOR APPELLANT

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FILED

JUN 15 1957

PAUL P. O'BRIEN, CLERK

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 15504

UNITED STATES OF AMERICA, APPELLANT

v.

HELEN MCCARTHY WILLOUGHBY, APPELLEE

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA, NORTH-
ERN DIVISION*

BRIEF FOR APPELLANT

This action was brought by Helen McCarthy Willoughby to recover benefits, as primary beneficiary, under her deceased son's National Service Life Insurance policy (R. 3-5). The Government defended under 38 U.S.C. 802(w) on the ground that reinstatements of the policy had been procured by fraudulent misrepresentations of the insured (R. 6-11). On November 21, 1956, the district court, sitting without a jury, entered judgment for the plaintiff (R. 44-45). The United States filed a notice of appeal on January 16, 1957 (R. 45).

The jurisdiction of the district court rested upon Section 617 of the National Service Life Insurance Act (38 U.S.C. 817). This Court's jurisdiction is invoked under 28 U.S.C. 1291.

STATEMENT OF THE CASE

The undisputed facts are as follows: In September 1944, John R. Willoughby, while in military service, was issued a National Service Life Insurance policy in the amount of \$10,000 (R. 38). He received a medical discharge from the service in November 1945 as suffering from diabetes mellitus (R. 39).

On October 1, 1947, Willoughby permitted his National Service Life Insurance to lapse by failing to pay the premiums due thereon (R. 40). On July 12, 1948, he applied for reinstatement of the lapsed insurance pursuant to Veterans Administration regulations (see *infra*, p. 8), which provided for reinstatement on a comparative health basis, *i.e.*, where the applicant is in as good health on the date of application as he was on the due date of the premium in default (R. 40). In filling out the prescribed Veterans Administration form (R. 19), Willoughby answered questions 8, 9 and 10 therein as follows (*ibid.*):

8. Are you now in as good health as you were on the due date of the first premium in default?
[x] Yes [] No.

9. Have you been ill, or suffered or contracted any disease, injury, or infirmity, or been prevented by reason thereof from attending your usual occupation, or consulted a physician, surgeon, or other practitioner for medical advice or treatment at home, hospital, or elsewhere, in regard to your health, since lapse of this insurance? [] Yes [x] No. (If "yes," give all dates and full particulars below.)

10. Have you ever applied for disability compensation, retirement pay, pension or waiver of

insurance premiums? [x] Yes [] No. (If "yes," give Claim No. below.) C—No.

Willoughby did not list a "C-Number" in the space provided following question 10 (*ibid.*).

On the basis of the representations as to comparative health contained in this application, and upon payment of the due premiums, Willoughby's policy was reinstated by the Veterans Administration in July 1948 without requiring a medical examination (R. 29-30). Willoughby continued to pay the premiums on this policy until December 1, 1949, when the insurance again lapsed for non-payment of premiums (R. 40.)

On February 6, 1950, Willoughby executed another application for reinstatement on a comparative health basis (*ibid.*). In respect to the question, "Are you now in as good health as you were on the due date of the premium in default," Willoughby answered, "Yes." He answered "No" to the question as to whether, since the lapse of the insurance he had been ill, or had been prevented from attending his usual occupation or had consulted a physician (R. 27). This application (R. 20) did not contain a question similar to question 10 appearing on the prior application (*supra*, p. 2).

Again, on the basis of Willoughby's statements as to comparative health, the Veterans Administration, on February 9, 1950, reinstated his policy without requiring a medical examination (R. 15). Payment of premiums continued until September 1, 1950, when the policy lapsed for the third time for failure to pay premiums (R. 40).

On October 19, 1950, Willoughby once more applied for reinstatement of his insurance (*ibid.*). This application (R. 21) was identical in form to the second application, and Willoughby's answers to the questions were the same (*ibid.*). Because the application was dated August 30, 1950, and not mailed until October 19, 1950, Willoughby was informed by the Veterans Administration that it would be necessary to execute a supplemental comparative health statement covering the period from August 30, 1950 through October 19, 1950 (R. 30). Willoughby was also required to certify that "I am now in sound condition, mentally and physically, excepting as follows ——" (*ibid.*).

Without making any insertions in the space provided therefor, Willoughby executed this statement on December 1, 1950 (R. 22). Solely on the basis of the representations made by Willoughby in his application and supplemental certificate, the Veterans Administration reinstated the policy (R. 30). Willoughby continued to pay the premiums on this policy until his death in May 1952 (R. 17).

The district court expressly found that Willoughby had falsely represented the state of his health on all of his applications for reinstatement (R. 41). This finding was based in substance upon the following evidence:

Between the lapse of his insurance on October 1, 1947, and his first application for reinstatement on July 12, 1948, Willoughby visited a physician, Dr. E. R. Schottstaedt of Fresno, California, on two occasions to receive various treatments and tests with respect to his diabetic condition (R. 25). Between the lapse of his insurance on December 1, 1949, and his second application for re-

instatement on February 6, 1950, Willoughby visited another physician, Dr. C. E. Suits of Visalia, California, for examination and treatment on eight occasions (R. 27-28).¹ Dr. Suits reported that Willoughby had suffered from "diabetes for five years, swelling of ankles and feet, upset stomach, occasional nocturia and chronic diarrhea for six months" and diagnosed his condition as "diabetes, chronic diarrhea, mild hypertension" (R. 28). At the trial, Dr. Suits also testified that Willoughby's eyesight was progressively failing during the course of his treatment (*ibid.*).

When Willoughby's policy lapsed for the third time, *i.e.*, September 1, 1950, he was in the Fresno Veterans' Hospital, having been admitted some three weeks before (R. 31). His physical report showed that he had suffered almost complete loss of vision in his left eye with marked retinitis and partial loss of vision in his right eye with retinitis (*ibid.*). While in the hospital it was necessary for Willoughby to receive two blood transfusions and to have his insulin intake increased (*ibid.*). He was discharged on September 8, 1950, as having attained maximum hospital benefit with a diagnosis of "diabetes, mellitus, severe" and "glomerulus nephritis, chronic, severe, with azotemia" (*ibid.*). It was the progression of these diseases that resulted in his death in May 1952 (R. 60).

After Willoughby's death, his mother, appellee herein, who had been designated as primary beneficiary, filed a claim for the proceeds of the policy (R. 17). Her claim was denied on May 14, 1953, by the Director

¹ December 10, 1949; December 14, 1949; December 19, 1949; December 21, 1949; December 27, 1949; December 31, 1949; January 13, 1950; January 28, 1950.

of Claims Service of the Veterans Administration's District Office at Denver, Colorado, on the ground that Willoughby had secured reinstatements of the policy by fraud in misrepresenting the state of his health in his applications for reinstatement (R. 17-18).²

Following denial of her appeal by the Board of Veterans' Appeals, appellee brought this action in the court below to recover the \$10,000 payable under the policy (R. 3-5). The Government raised the defense of fraud (R. 8-11). At the conclusion of the trial the district court gave judgment in favor of the appellee (R. 44). Although finding expressly that the insured had knowingly made false representations with respect to material facts in his applications for reinstatement, and that the insured had made these representations with intent to deceive the Veterans Administration (R. 41), the district court stated that, under this Court's decision in *United States v. Kelley*, 136 F. 2d 823 it was required to find that the Government did not rely on the statements contained in the applications, since there was on file with the Veterans Administration information demonstrating the falsity of the representations (R. 36). The Court held that the Veterans Administration, as a single entity, had actual notice of the true state of health of the insured (R. 42-43).³ This appeal followed (R. 45).

² It was the opinion of the Chief Medical Consultant at the Denver District Office that if the medical evidence then on record had been disclosed when the various applications for reinstatement were made, the applications would have been medically rejected (R. 17).

³ The Court noted that "[w]ere it not for the Kelley case, [it] would adopt the reasoning contained in the decision of the Circuit Court of Appeals of the District of Columbia in the case of *United States v. Kieffer* [sic], 228 F. 2d 448, 1956, and would uphold the defenses of fraud set forth in the answer of the government" (R. 36).

STATUTES AND REGULATIONS INVOLVED

1. The National Service Life Insurance Act of 1940, 54 Stat. 1008, as amended (38 U.S.C. 801, *et seq.*) provides in pertinent part:

§ 802. Persons insurable; * * *

* * * * *

(w) *Incontestability of policies.*

* * * * *

Subject to the provisions of section 812 of this title, all contracts or policies of insurance before or after August 1, 1946, issued, reinstated, or converted shall be incontestible from the date of issue, reinstatement, or conversion, except for fraud, non-payment of premium, or on the ground that the applicant was not a member of the military or naval forces of the United States.

* * * * *

§ 808. *General administrative provisions.*

The Administrator, subject to the general direction of the President, shall administer, execute, and enforce the provisions of this chapter, shall have power to make such rules and regulations, not inconsistent with the provisions of this chapter, as are necessary or appropriate to carry out its purposes, and shall decide all questions arising thereunder. * * *

2. Veterans Administration Regulations 3423 and 3424 (38 C.F.R. 1949 Ed., §§ 8.23, 8.24) provide in pertinent part:

§ 8.23—*Health Requirements*: National Service Life Insurance * * * may be reinstated if application and tender of premiums are made:

(a) On or before July 31, 1948, or within three months after lapse, whichever is later, provided the applicant be in as good health on the date of application and tender of premiums as he was on the due date of the premium in default and furnishes evidence thereof satisfactory to the Administrator.

(b) Subsequent to July 31, 1948, and after expiration of the three-month period mentioned in paragraph (a) of this section, provided applicant is in good health (§ 8.1) on the date of application and tender of premiums and furnishes evidence thereof satisfactory to the Administrator of Veterans' Affairs.

§ 8.24—*Application and medical evidence*: * * * Applicant's own statement of comparative health may be accepted as proof of insurability for the purpose of reinstatement under § 8.23(a), but, whenever deemed necessary in any such case by the Administrator, report of physical examination may be required. * * *

SPECIFICATION OF ERRORS

1. The district court erred in holding that a National Service Life Insurance policy, reinstated solely on the basis of the applicant's own false statements of comparative health, cannot be contested for fraud by the Veterans Administration where its claims file contains information which would demonstrate the falsity of the representations.

2. The district court erred in holding that, in approving an application for reinstatement of insurance,

the Insurance Service of the Veterans Administration is chargeable with actual notice of facts contained in the Administration's claims file.

3. The district court erred in holding that, in reinstating the lapsed policy, the Veterans Administration did not rely upon the false statements of comparative health contained in the insured's applications for reinstatement.

4. The district court erred in granting judgment for the plaintiff.

SUMMARY OF ARGUMENT

The court below has held that the Veterans Administration, in reinstating a lapsed policy of National Service Life Insurance solely in reliance upon the applicant's own false representations of comparative health, cannot contest the policy for fraud where an examination of the applicant's disability compensation file would have demonstrated the falsity of the representations. Since there is no suggestion in this case that the employees of the Insurance Service had personal knowledge of the contents of the claims file prior to the death of the insured, the decision below imposes upon the employees of the Insurance Service of the Veterans Administration who approve applications for reinstatement a duty to search the claims files for possible medical information which would contradict the applicant's own representations as to his state of health.

As a practical matter, the personnel of the Insurance Service are entirely justified in relying upon the applicant's own representations. In order to avoid delay in processing the flood of applications which followed the Veterans Administration's campaign to inform veterans of their insurance reinstatement rights, the In-

insurance Service adopted the procedure of automatically approving applications for reinstatement, provided that payments of premiums were enclosed and the applicant had not unsatisfactorily answered one of the questions on the application concerning his comparative health. This expeditious practice was followed even where the applicant indicated that he had previously filed a claim with the Veterans Administration, since it was apparent that having filed at one time a claim for "disability compensation, retirement pay, pension or waiver of insurance," did not mean that an examination of the claims file would provide information bearing on the applicant's health during the period of lapse. Indeed, the Veterans Administration, regarding this question as surplusage, changed its application form (see Willoughby's second and third applications (R. 20, 21)), and no longer asks the veteran whether he had previously filed a claim. Thus, the Insurance Service relies exclusively upon the relevant information furnished by the applicant bearing on his state of health.

Moreover, neither statute nor case law, including this Court's decision in *United States v. Kelley*, 136 F. 2d 823, imposes upon the Insurance Service of the Veterans Administration a duty to examine an applicant's claims file for medical information contradictory to that supplied by the applicant. 38 C.F.R. § 8.23, authorizing reinstatement of lapsed policies on the basis of comparative health, parallels a former section of the National Service Life Insurance Act. This section was repealed for the express purpose of permitting the Administrator of Veterans Affairs to prescribe by regulation the conditions of reinstatement, and the

regulation adopts the language of the section in providing that policies shall be reinstated on evidence "satisfactory to the Administrator." 38 C.F.R. § 8.24, formulating and publicizing the quantum of evidence which the Administrator deems "satisfactory", provides that the "applicant's own statement of comparative health may be accepted as proof of insurability." This regulation is clearly a valid exercise of the Administrator's authority and is plainly "necessary" and "appropriate" to carry out the purposes of the Act.

The pertinent cases recognize and endorse the right of the Veterans Administration to reinstate a lapsed policy of National Service Life Insurance solely on the basis of the applicant's own representations of comparative health. *United States v. Kiefer*, 228 F. 2d 448 (C.A. D.C.), certiorari denied, 350 U.S. 933; *McDaniel v. United States*, 196 F. 2d 291 (C.A. 5). We show below that this Court's opinion in *United States v. Kelley*, 136 F. 2d 823, is plainly inapposite and that certain dicta in the opinion, which the court below felt constrained to follow, has been specifically distinguished by other courts of appeals in cases involving facts similar to those here involved.

We urge finally that, even if the employees of the Veterans Administration who approved the applications here were under a duty to search for the applicant's claims file, it is settled beyond question that their failure to do so can neither bind the United States nor estop it from contesting the validity of the policy on the ground of fraud.

ARGUMENT

I

The District Court Erred in Holding That the Veterans Administration Did Not Rely Upon the False Statements of Comparative Health Contained in Willoughby's Applications for Reinstatement.

A. Under the Established Practice of the Veterans Administration, the Insurance Service, in Processing Applications for Reinstatement, Relies Upon Applicants' Representations

The procedures followed by the Insurance Service in connection with Willoughby's applications for reinstatement were neither unusual nor haphazard, but were in accord with established practice dictated by practical considerations. Efficient administration requires that the service of the Veterans Administration handling insurance matters, including applications for reinstatement, be separate and distinct from those services handling hospitalization, pensions, disability, compensation, loans, educational matters, vocational rehabilitation and other veterans' benefits. By separating these functions and by maintaining separate files for National Service Life Insurance for individual veterans, more expeditious processing of insurance matters is made possible. See *United States v. Kiefer*, 228 F. 2d 448, 451 (C.A. D.C.), certiorari denied, 350 U.S. 933.

In addition, to provide better service to the millions of veterans in all parts of the country, these functions are administered decentrally by the various services. Thus, veterans' claims files, containing their applications for disability compensation and medical histories, are maintained in Veterans Administration Regional Offices. Insurance files, on the other hand, have since

1946, been maintained in Veterans Administration District Offices.⁴

The mere fact that the insurance and compensation functions of the Veterans Administration are administered separately and decentrally does not, of course, preclude utilization of the claims files by the Insurance Service. It does, however, necessarily result in delay in the processing of applications where examination of a claims file is made. It was to minimize this delay in processing applications for reinstatement, and the concurrent hiatus in insurance protection, that the procedure followed here was adopted.

That the adoption of this procedure was reasonable in the circumstances cannot be seriously questioned. By June 30, 1947, there remained only some 5,700,000 NSLI policies of the approximately 16,000,000 policies which had been in force at the termination of hostilities two years earlier.⁵ In its avuncular relationship to veterans, the Veterans Administration undertook an extensive publicity campaign to persuade veterans to reinstate their insurance. "Through June 30, 1948, the informational program produced approximately 1¾ million applications for reinstatement covering a total of over \$10,000,000,000 of insurance." ⁶

⁴ Thus, Willoughby's insurance records were on file in the Veterans Administration's District Office at Oakland, California, while his claims records were on file in the Regional Office at San Francisco, California (R. 33, 69).

⁵ See Annual Report of the Administrator of Veterans Affairs for the Fiscal Year Ending June 30, 1945, H. Doc. 467, 79th Cong., 2d Sess., p. 26; Annual Report of the Administrator of Veterans Affairs for the Fiscal Year Ending June 30, 1947, H. Doc. 453, 80th Cong., 2d Sess., p. 46.

⁶ Annual Report of the Administrator of Veterans Affairs for the Fiscal Year Ending June 30, 1948, H. Doc. 8, 81st Cong., 1st Sess., p. 66.

The Veterans Administration had the choice between two alternatives, neither of which was completely satisfactory. On the one hand, it could delay final action upon the reinstatement applications until the claims file of each veteran was examined to make certain that the application was accurate. While this procedure would have protected the Veterans Administration against fraudulent claims such as is here involved, it would have resulted in a substantial delay in processing the reinstatement application, and, in the interim, the applicant would be without NSLI insurance. On the other hand, the Veterans Administration could generally accept the applicant's representation at face value without checking his claims file. This procedure would permit expeditious action on reinstatement applications, and while the Veterans Administration recognized that in the process it might grant reinstatement upon fraudulent applications it anticipated that these would be relatively few in number. To avoid penalizing the many in order to guard against the relatively few, and thereby better to discharge its responsibilities to veterans generally, the Veterans Administration adopted the latter procedure—a decision further buttressed by the fact that transferal of the claims files from the Regional Offices to the District Offices, located in other cities, would have resulted in similarly substantial delays in handling other claims for veterans' benefits by the Claims Service, which claims could not be processed without the claims files.

Under the procedure thus adopted, the Insurance Service does not delay reinstatement where the applicant represents (1) that he is now in as good health as he was on the due date of the first premium in default, and (2) that he has not been ill or consulted a physician

since the lapse of his insurance (R. 64). Where, however, either question is not so answered, the application is forwarded to the Insurance Medical Division for further consideration (R. 64). Even at the time of Willoughby's first application for reinstatement, where the application form asked the veteran to note his "C" number if he has "ever applied for disability compensation, retirement pay, pension or waiver of insurance premiums," this same procedure was followed. See *McDaniel v. United States*, 196 F. 2d 291, 294 n. 3 (C.A. 5); *United States v. Kiefer*, 228 F. 2d 448, 451 (C.A. D.C.), certiorari denied, 350 U.S. 933.

The reasons for this are obvious. As the embrative nature of the question indicates, claims are not limited to disability claims, and "C" numbers may be assigned, *inter alia*, to claims for retirement pay, pensions or waiver of premiums. See *United States v. Kiefer*, *supra* at 451. Thus, the fact that an application for reinstatement of insurance has a "C" number does not necessarily mean that he has any physical disability whatever. While the "C" number may have been issued for a disability claim, this possibility was not regarded as sufficient in itself to justify the delay involved in requiring examination of the applicant's claims file. For even when the "C" number was issued in connection with a disability claim, this did not mean that the claims file would contain information bearing on the applicant's current eligibility for reinstatement on a comparative health basis. The claim for disability benefits may have been made substantially prior to the lapse of insurance—as was the case in a goodly number of instances where disability claims were filed concurrently with the mass discharges from the armed services in 1945 and 1946—and the disability for which the

“C” number was issued may have been cured or may be no worse on the date of application for reinstatement than it was on the due date of the premium in default. The claim for disability benefits may also have been denied for lack of compensability. Furthermore, assuming that the applicant had a medical history subsequent to the date of lapse, that history would not necessarily be contained in the claims file since the applicant may have been treated by private physicians.

Because examination of the claims file may thus prove fruitless, the Veterans Administration sought to determine from the applicant himself whether it will be necessary to submit his application to the Medical Division for further consideration. And, as Willoughby's second and third applications for reinstatement reveal (R. 20, 21), the form no longer inquires of the veteran whether he has ever applied for “disability compensation, retirement pay, pension or waiver of premiums”; nor is the veteran asked to insert his “C” number if, in fact, he has one. Hence, if the applicant states in answer to the comparative health questions that he is now in as good health as he was on the date of lapse, and that he has not been ill or consulted a physician since that time, there is no occasion to delay approval of the application for reinstatement. To act otherwise would be to presume in every case where satisfactory answers are given to such questions, that the applicant has, *prima facie*, made false representations.

In refusing to indulge in this presumption, which experience has shown to be contrary to fact in most cases, the Veterans Administration recognized that there would be a small percentage of cases in which the

reinstatement would be based on inaccurate representations. Where the applicant has proceeded in good faith, payment on the policy is made even though the applicant was, in fact, ineligible for reinstatement. However, where the applicant knowingly submits false representations (as the court below found to be the situation here), he should not be permitted to profit from his deliberate action by a ruling that payment on his policy is also required.

B. Reinstatement of NSLI Policies Solely on the Basis of an Applicant's Own Representations of Comparative Health Is Authorized by Valid Administrative Regulations

As we have seen, the reinstatement of Willoughby's insurance, on the basis of his own representations of comparative health without a search for his claims file, was not the result of negligence on the part of the Insurance Service. Rather, it was in accordance with a settled administrative practice established by deliberate decision. There is nothing in the statute or regulations which suggests that this practice is unauthorized or that the Insurance Service employees who processed Willoughby's application were under any duty to examine his claims file. To the contrary, this practice was authorized by Congress and by the regulations.

During the period here involved, the Act contained no general provisions as to the terms and conditions for reinstatement.⁷ Earlier, in Section 602(y) of the Act,

⁷ On this score, the Act provided only that reinstatement should not be denied because of any disability or disabilities, less than total in degree, resulting from or aggravated by active service. 38 U.S.C. 802(c) (2).

Congress had made express provision as to the state of health required for reinstatement. Act of August 1, 1946, 60 Stat. 781, 787.⁸ With respect to applications made within six months after the date of enactment of the Insurance Act of 1946, or within six months after the date of lapse, whichever was later, Section 602(y)(2) had provided for reinstatement where the applicant was "in as good health" on the date of application as he was on the due date of the premium in default and "furnishes evidence thereof satisfactory to the Administrator." With respect to applications subsequent to that cut-off date, Section 602(y)(1) had required the applicant to furnish "evidence satisfactory to the Administrator" that he was "in good health" on the date of application. At the request of the Administrator, and in order to permit greater administrative flexibility in fixing the terms and conditions of reinstatement, Section 602(y) was repealed shortly after its enactment and was not in force at the times

⁸ "(y)(1) Any level premium term insurance which has lapsed may be reinstated within the term upon written application, payment of two monthly premiums, and evidence satisfactory to the Administrator that the applicant, subject to the provisions of the second sentence of section 602(c)(2), *supra*, is in good health.

"(2) Any level premium term insurance which has lapsed may be reinstated within the term upon written application, made within six months after the date of such lapse or within six months after the date of enactment of the Insurance Act of 1946, whichever is the later, and payment of two monthly premiums, provided such applicant is in as good health on the date of application and tender of premiums as he was on the due date of the premium in default and furnishes evidence thereof satisfactory to the Administrator: *Provided*, That when the insured makes inquiry prior to the expiration of the grace period disclosing a clear intent to continue insurance protection, an additional reasonable period not exceeding sixty days may be granted for payment of premiums due, but premiums in any such case must be paid during the lifetime of the insured."

Willoughby applied for reinstatement. Act of February 21, 1947, 61 Stat. 6. See H. Rept. 13, 80th Cong., 1st Sess.; S. Rept. 22, 80th Cong., 1st Sess.⁹

Pursuant to the authority vested in him "to make such rules and regulations, not inconsistent with the provisions of this Act, as are necessary or appropriate to carry out its purposes" (38 U.S.C. 808), the Administrator had prescribed the following regulations

⁹ Both the House and Senate Reports on the bill repealing Section 602(y) include a letter from the Administrator of Veterans Affairs which both committees referred to as explaining the need for the proposed legislation. The letter stated in pertinent part (H. Rept. 13, p. 3, S. Rept. 22, p. 3, 80th Cong., 1st Sess.):

The purpose of section 3 of the proposed bill is to repeal subsections (y) (1) and (y) (2) of section 602 of the National Service Life Insurance Act of 1940, as amended. Subsection (y) (1) authorizes reinstatement of level-premium term insurance upon written application, payment of two monthly premiums, and evidence satisfactory to the Administrator that the applicant, subject to the provisions of the second sentence 602(c) (2), is in good health. The part of section 602(c) (2) which is referred to contains independent provisions relating to the exclusion of service-connected disability, less than total in degree, in determining good health for reinstatement purposes. These general provisions would continue to be applicable to reinstatement as provided for by regulations upon the repeal on subsection (y) (1).

Reinstatement within the term, upon the payment of two monthly premiums and a showing of good health, is now authorized under Veterans' Administration regulations and to meet existing conditions, was so authorized for several years prior to the enactment of subsection (y) (1). Although no change in such regulations is presently contemplated, it is believed that the matter of reinstatement generally is so affected by changing conditions involving the interests of policyholders as a group that considerable flexibility should be permitted in determining when and upon what conditions reinstatement may be accomplished. In keeping with this general principle, the provisions of subsection (y) (1) should be repealed in order that regulations with respect to the subject matter thereof shall be susceptible of such periodic changes as may be warranted.

with respect to reinstatement: 38 C.F.R. § 8.23(a) (*supra*, p. 8) provided that insurance may be reinstated “on or before July 31, 1948, or within three months after lapse, whichever is later, provided the applicant be in as good health on the date of application and tender of premiums as he was on the due date of the premium in default and furnishes evidence thereof satisfactory to the Administrator.” As to reinstatements subsequent to that period, 38 C.F.R. § 8.23(b) (*supra*, p. 8) requires that the applicant be “in good health” on the date of application and tender of premiums and furnish “evidence thereof satisfactory to the Administrator.” With respect to the quantum of evidence satisfactory to the Administrator, 38 C.F.R. § 8.24 (*supra*, p. 8) provided, in pertinent part, that the “applicant’s own statement of comparative health may be accepted as proof of insurability for the purpose of reinstatement under 8.23(a) * * *.”

Unless “inconsistent” with the Act or not “necessary or appropriate to carry out its purposes” (38 U.S.C. 808), these regulations must be sustained. *Zazove v. United States*, 334 U.S. 602, 612. Since 38 C.F.R. § 8.23 simply paralleled the language of former Section 602(y)—which was repealed in order to give the Administrator greater freedom in processing applications for reinstatement (see *supra*, p. 19)—it certainly cannot be said that this regulation, in permitting reinstatement on a comparative health basis upon evidence thereof satisfactory to the Administrator, is inconsistent with Congressional intent.¹⁰ Nor can it be

¹⁰ The concern of Congress that veterans retain the right to reinstate lapsed NSLI policies on a comparative health basis is evidenced by the fact that on December 5, 1947, Congresswoman Rogers of Massachusetts, aware that under the existing Veterans

suggested that 38 C.F.R. § 8.24 exceeds the authority of the Administrator. If the Administrator is empowered to reinstate on evidence of comparative health satisfactory to him, it is obvious that he is authorized to determine the character and quantum of evidence which is satisfactory to him. The regulation does no more than formulate and make public that determination, *i.e.*, that an applicant's own statements of comparative health may be accepted as proof of insurability. Further, as we have seen, there can be no serious doubt that these regulations are "necessary and appropriate" to carry out the purposes of the Act. As pointed out above, pp. 12-16, these regulations are based on weighty practical considerations and represent a reasonable solution of a complex administrative problem. *United States v. Kiefer*, 228 F. 2d 448 (C.A.D.C.), certiorari denied, 350 U.S. 933.

Accordingly, since the regulations are valid and the procedure followed was in accordance with the regulations, the employees of the Insurance Service who processed Willoughby's applications for reinstatement were under no duty, as a matter of law, to examine

Administration regulations the right expired at the end of that month, introduced a bill to amend the NSLI Act and extend for another year the right to reinstate on a comparative health basis "on evidence thereof satisfactory to the Administrator." H.R. 4651, 80th Cong., 1st Sess.; 93 Cong. Rec. 11116. This bill was favorably reported by the House Committee on Veterans Affairs, H. Rept. 1164, 80th Cong., 1st Sess., and passed by the House on December 15, 1947. 93 Cong. Rec. 11414. The bill was referred to the Senate Finance Committee on December 16, 1947. 93 Cong. Rec. 11431. No action was taken on the bill in the Senate, but early in 1948 the Veterans Administration amended its regulation to extend the period within which reinstatement could be had on a comparative health basis through July 31, 1948. 13 F.R. 181 (1948).

his claims file and were justified in relying upon his representations, without thereby waiving the Government's right under 38 U.S.C. 802(w) to contest the policy thereafter on the ground that the representations were fraudulent.¹¹

C. The pertinent case law does not preclude reliance upon an applicant's own representations of comparative health.

It is clear that the Insurance Service is under no duty to search the files of other Government agencies to determine the truth or falsity of an applicant's own statements as to his health. *United States v. Depew*, 100 F. 2d 725 (C.A. 10); *United States v. Riggins*, 65 F. 2d 750 (C.A. 9). This same conclusion has been reached with respect to the files of other services of the Veterans Administration (*United States v. Cooper*, 200 F. 2d 954 (C.A. 6); *Clohesy v. United States*, 199 F. 2d 475 (C.A. 7); *Halverson v. United States*, 121 F. 2d 420 (C.A. 7), certiorari denied, 314 U.S. 695; *Jones v. United States*, 106 F. 2d 888 (C.A. 5)), and has been followed even where the applicant has listed his "C" number on his application for reinstatement. *United States v. Kiefer*, 228 F. 2d 448 (C.A.D.C.), certiorari denied, 350 U.S. 933; *McDaniel v. United States*, 196 F.2d 291 (C.A. 5).

In *McDaniel*, *supra*, the insured, in twice applying for reinstatement of his National Service Life Insurance, falsely answered the comparative health questions contained therein. However, he answered in the

¹¹ Even assuming that the employees were under a duty to inspect the claims file, the Government was, as we shall show, *infra*, pp. 29-31, neither bound nor estopped by their non-feasance.

affirmative to the question "Have you ever applied for disability retirement pay, pension, or waiver of insurance premiums," and did, in fact, list his "C" number (*id.* at 292). The argument was made that, although the representations in the applications for reinstatement were false, there was no fraud since the true facts concerning the insured's state of health were contained in the applicant's claims file and the applicant had listed his "C" number in his application. In rejecting this argument, the Fifth Circuit held (196 F. 2d at 294):

* * * we think it entirely clear that no amount of casuistry short of that which would make black seem white, the false true, can explain away or justify the false answers the insured deliberately gave twice in almost as few months.

We think it equally plain that it cannot be justly held that an insured who has been asked clear and simple questions, upon the understanding that his answers may be accepted as true, without further inquiry, may avoid the consequences of having answered falsely by the claim, that the United States, by consulting the disability files could have found out that what he put forward as true was in fact false, and, therefore, may not complain that it was tricked into reinstating the certificate.

As this court has said, "It is elementary that one who is guilty of fraud cannot urge estoppel [or waiver] against the other party to the contract for the purpose of making his fraud effective", *New York Life Ins. Co. v. Odum*, 5 Cir., 93 F. 2d 641, 644. Especially may he not do this here where it is not claimed that those responsible for reinstating

the certificate actually knew that the answers given were false, but only that, if they had followed up the reference in Sec. 10 to the C-number of the disability application they would have found by inquiry that there were.

The very same argument was urged upon the District of Columbia Circuit in *Kiefer, supra*, where the applicant had also falsely represented his comparative health and had also inserted his "C" number in the space provided therefor. In addition to relying on *McDaniel*, the court ruled (228 F. 2d at 450-451):

Where no claim number is disclosed on a reinstatement application, it has been held that "knowledge of what is contained in the files of [other Veterans Administration services] is not imputable to the insurance service which passes upon application for reinstatement." We think there are considerations which justify the application of the same rule where the claim number is disclosed.

First, assignment of "C" numbers is not limited to disability claims. They include, *inter alia*, claims for retirement pay, pensions or waiver of premiums. Hence a "C" file does not necessarily contain information material in determining the insured's eligibility for reinstatement on the basis of his comparative health.

Second, in the interest of efficient administration of its vast operations, the Veterans Administration insurance and compensation services maintain their respective files separately. And to expedite its great volume of business, the insurance service, pursuant to regulation, reinstates insurance without requisitioning the "C" file where the insured

affirms that his health is no worse than it was at the time his insurance lapsed. Such reliance on the applicant's representations eliminates unnecessary delay caused by needless examination of claim files that may be unrelated to comparative health. Clearly the procedure under the regulation is reasonably related to efficient administration of the insurance program and is valid.

It seems clear that the *McDaniel* and *Kiefer* decisions apply with even greater force to this case since Willoughby, as we have pointed out, *supra*, p. 3, failed to add his "C" number when he affirmatively answered, in his first application for reinstatement, that he had applied for "disability compensation, retirement pay, pension or waiver of insurance premiums."

D. *This Court's decision in United States v. Kelley, 136 F. 2d 823, is not to the contrary*

To begin with, *Kelley* did not involve the issuance of insurance on a comparative health basis in accordance with regulations specifically promulgated to afford expeditious processing of reinstatement applications. There, the insured had applied for disability benefits in 1931. In 1932, he applied for insurance under Section 310 of the World War Veterans Act, 1924 (38 U.S.C. 512a), which required that the applicant be in good health at the time of application. He stated in response to question 13 of the application that he had never applied for "Government compensation" and answered question 25 by stating that he was then in good health. The Government contested the policy for fraud, claiming that the answers to these questions were false. The jury found, with respect to the former answer, that the

insured had no intent to deceive, and further found that the latter answer was not, in fact, false. This Court affirmed, pointing out that the insured may not have understood that the disability benefits he had applied for in 1931 were "Government compensation" within the meaning of question 13, and that there was no evidence which required a finding that he did so understand (*id.* at 825). The Court further held that the truth or falsity of the answer to question 25 was for the jury to decide (*id.* at 826).

It was thus unnecessary to resolve the issue of the Government's reliance upon the insured's representations. The Court, however, by way of dictum, stated that the evidence did not warrant a finding that the Government relied upon or was deceived by the answer to question 13 (*id.* at 825). The Court declared that the Government's knowledge was actual rather than imputed since the information that the insured had filed a claim for disability compensation was not in the files of another Government agency but in the files of the Veterans Administration itself. Continuing, the Court pointed out that, in any event, the jury could reasonably infer that the Insurance Service had knowledge of the insured's claim for compensation since the evidence showed that his "C" number had been endorsed on the application for insurance by an employee of the Veterans Administration prior to the Insurance Service's approval of his application (*id.* at 826).¹²

¹² The Court denied the Government's motion to amend that portion of the Court's opinion stating that the Veterans Administration had notice of the filing of a claim for compensation. In a concurring opinion on the motion to amend, Chief Judge Denman rejecting the Government's contention that the Court was imposing

In this light, it is clear that the *Kelley* case—so strongly relied upon by the court below—should not have been afforded the broad sweep that it was. In the instant case, the question is whether the Insurance Service had actual knowledge of the contents of Willoughby's claims file, and whether the Insurance Service, in the light of existing regulations, was under a duty to search Willoughby's claims file for medical information contrary to that supplied by him. In *Kelley*, however, the issue was simply whether the Insurance Service had personal knowledge that the insured had filed a claim for compensation, not even whether it had personal knowledge of the contents of the claims file. And, on the evidence, it clearly appeared that the employees of the Insurance Service who processed the

an unwarranted administrative burden on the Administration, stated (136 F.2d at 827), "One can imagine the short shrift we would give to a similar plea of the Equitable Life * * *." We think it appropriate to note that in providing relatively inexpensive insurance to servicemen, the Government has not gone into the insurance business; rather, it has entered into, in the words of Mr. Justice Holmes, "a relation of benevolence * * * at considerable cost to itself for the soldier's good." *White v. United States*, 270 U.S. 175 at 180. No profit is contemplated from the administration of the National Service Life Insurance Act, and gains or savings which are made are returned to the policyholders in the form of dividends. 38 U.S.C. 805. In these circumstances, the Government has been considered in a different position from that of commercial insurers. *McIndoe v. United States*, 194 F. 2d 602 (C.A. 9); *United States v. Holley*, 199 F. 2d 575 (C.A. 5); *James v. United States*, 185 F. 2d 115 (C.A. 4). Moreover, it is noteworthy that *Kelley* involved an insurance claim under the war risk insurance system of World War I. Since that time, the Veterans Administration has been confronted with the necessity of administering the several millions of insurance issued to World War II servicemen under the National Service Life Insurance Act. Whatever accuracy there might have been in Judge Denman's comparison to Equitable Life, that comparison plainly has no validity in the light of this tremendously increased administrative problem.

application for insurance, in fact, knew that a claim for compensation had been filed.

The Seventh Circuit in *Clohesy v. United States*, *supra*, and the District of Columbia Circuit in *United States v. Kiefer*, *supra*, have both regarded *Kelley* as so limited. Thus in *Kiefer*, where the controlling facts were indistinguishable for all practical purposes from those of the present case (see *supra* p. 24) the Court of Appeals for the District of Columbia Circuit distinguished *Kelley* pointing out (228 F. 2d at 451):

There the alleged falsity related to the insured's statement, on an original application for insurance, that he had never applied for "government compensation." A Veterans Administration official had endorsed Kelley's "C" number on his application prior to its approval. The jury could reasonably have inferred from this endorsement that, since the official had found the "C" number himself, he must have found it as a result of inspection of the file. On that basis, we agree with the Seventh Circuit in *Clohesy v. United States* that, on the particular facts of *Kelley*, the insurance section passing on the application had "actual, not imputed" knowledge that the insured had filed for compensation.¹³

Thus, since the *Kelley* decision, two courts of appeals have regarded the *Kelley* case to be limited in scope and not to reach a situation such as is here presented.¹⁴ And none of the cases, before or after *Kelley*, afford

¹³ *Kiefer's* petition for certiorari, based primarily upon an alleged conflict with *Kelley* and *Clohesy*, was denied by the Supreme Court. 350 U.S. 933.

¹⁴ See also *Clarke v. United States*, 102 F. Supp. 338 (E.D. Mo.).

any support for the proposition that, in the circumstances of a case such as this, the employees of the Insurance Service who approved Willoughby's applications for reinstatement were not justified in accepting his representations at face value but rather were under a duty to search the files of other services of the Veterans Administration.

II

Even if the Employees of the Veterans Administration Who Approved Willoughby's Applications for Reinstatement Were Under a Duty to Examine His Compensation File, the United States Is Neither Bound Nor Estopped by Their Failure to Do So.

As we have shown, both the applicable regulations and the pertinent case law demonstrate that the Insurance Service employees who processed Willoughby's applications for reinstatement of his insurance were under no duty to consider his disability compensation file in connection therewith. However, even if it be held that they did have such a duty, we submit that their failure to examine the claims file can neither bind the United States nor estop it from contesting the policy for fraud.

It has long been the settled rule that the United States is neither bound nor estopped by the unauthorized acts of its agents. *E.g., Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384; *United States v. California*, 332 U.S. 19, 39-40; *Royal Indemnity Co. v. United States*, 313 U.S. 289, 294; *United States v. Stewart*, 311 U.S. 60, 70; *United States v. City and County of San Francisco*, 310 U.S. 16, 32; *Wilber National Bank v. United States*, 294 U.S. 120, 123-124. This rule is applicable to the insurance activities of the

Government, in general (*Federal Crop Ins. Corp. v. Merrill, supra*), and to National Service Life Insurance, in particular. *E.g.*, *McDaniel v. United States*, 196 F. 2d 291 (C.A. 5); *United States v. Lewis*, 202 F. 2d 102 (C.A. 5); *United States v. Holley*, 199 F. 2d 575 (C.A. 5); *McIndoe v. United States*, 194 F. 2d 602 (C.A. 9); *James v. United States*, 185 F. 2d 115 (C.A. 4); *United States v. Fitch*, 185 F. 2d 471 (C.A. 10); *Niewiadomski v. United States*, 159 F. 2d 683 (C.A. 6), certiorari denied, 331 U.S. 850; *Halverson v. United States*, 121 F. 2d 420 (C.A. 7), certiorari denied, 314 U.S. 695; *Wilbur National Bank v. United States*, 69 F. 2d 526 (C.A. 2), affirmed, 294 U.S. 120.

Finally, it should be observed that, in any event, there is no occasion here for waiver or estoppel. The doctrine of waiver and estoppel are applicable only where the insured is deceived or misled to his detriment (*Wilbur National Bank v. United States*, 294 U.S. at 124), and the party who is guilty of fraud cannot urge those doctrines against the other party to the contract for the purpose of making his fraud effective. *McDaniel v. United States, supra*, at 294. In the present case, the district court expressly found that Wiloughby deliberately made false representations to the Veterans Administration in the expectation that they would be relied upon. Accordingly, he had no adequate reason to suppose that his fraud had been effective to create a valid and binding insurance policy. As the Seventh Circuit aptly noted in *Clohesy v. United States, supra*, at 478:

If, as plaintiff contends, the insured was misled by the fact that the Veterans Administration continued to accept premiums on the policy to the time

of his death, he could have been misled only into thinking that, up to that time, his conscious, deliberate deception had succeeded.

CONCLUSION

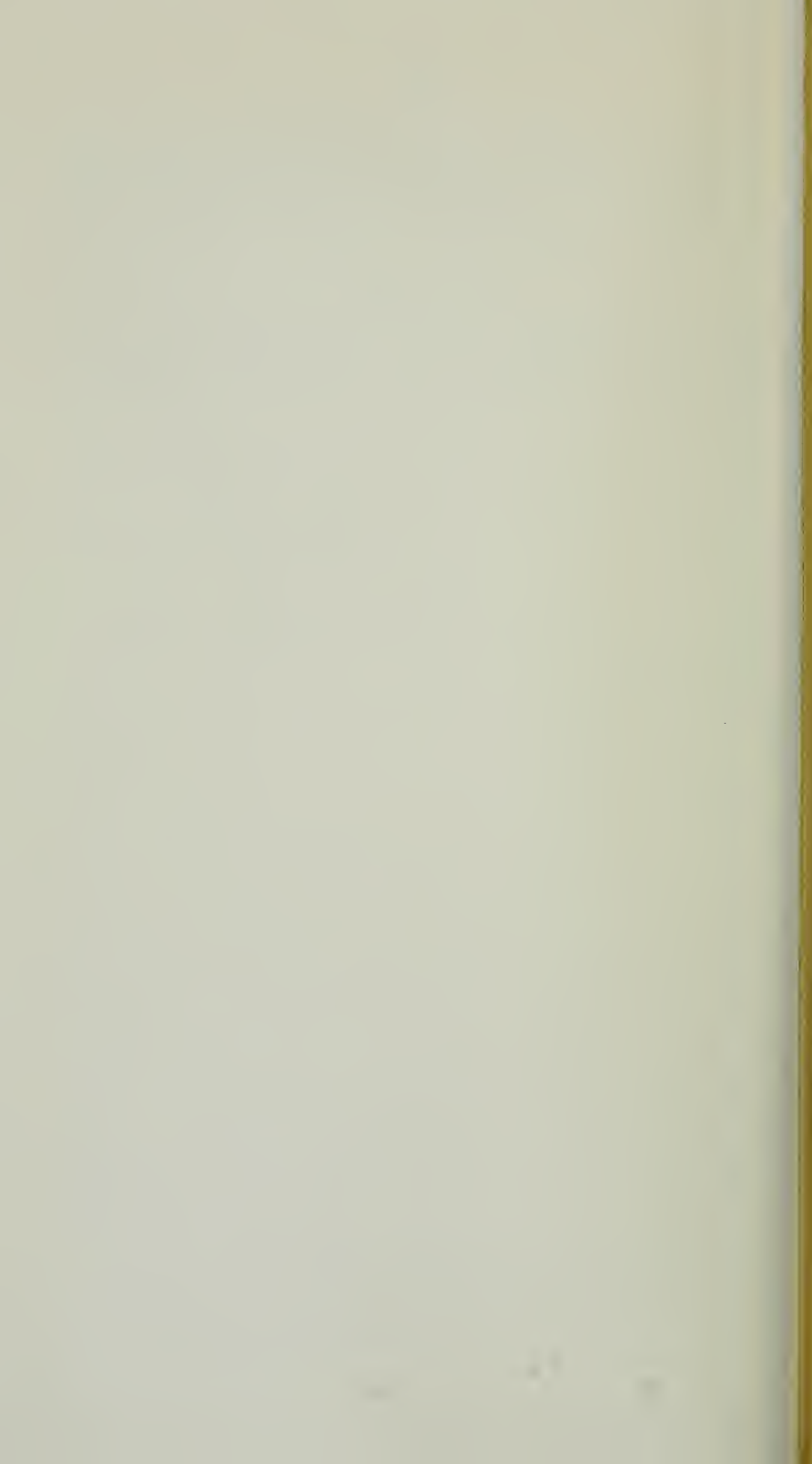
For the foregoing reasons, it is respectfully submitted that the judgment below should be reversed.

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JUNE, 1957.



No. 15,508

IN THE

United States Court of Appeals
For the Ninth Circuit

CHARLES E. TOLIVER,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

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No. 15,508

IN THE

**United States Court of Appeals
For the Ninth Circuit**

CHARLES E. TOLIVER,

VS.

UNITED STATES OF AMERICA,

Appellant,

Appellee.

BRIEF FOR APPELLEE.

JURISDICTION.

Jurisdiction is invoked under Section 1291 and 2255, Title 28 United States Code.

STATEMENT OF THE CASE.

Findings of Fact and Conclusions of Law of the Court:

Charles E. Toliver has filed a motion under Section 2255 of Title 28 United States Code alleging that his sentence is illegal. On December 6, 1956 a hearing was held in which Toliver was represented by counsel and the United States by the United States At-

torney. The cause being submitted on the motion, files and records of the case, the Court having considered the same, and heard arguments of counsel, and being fully advised makes the following:

FINDINGS OF FACT.

I.

That Toliver was charged in the first count of the indictment as follows:

“The Grand Jury charges: THAT Charles E. Toliver, alias Little Snooks, the defendant herein, on or about the 7th day of March, 1953, in the City of Oakland, County of Alameda, State of California, within the Southern Division of the Northern District of California, unlawfully did sell, dispense and distribute, not in or from the original stamped package, a certain quantity of a derivative and preparation of morphine, to-wit a lot of heroin, in quantity particularly described as one envelope containing approximately 128 grains of heroin.”

II.

That Toliver was charged in the third count of the indictment as follows:

“The Grand Jury further charges: THAT Charles E. Toliver, alias Little Snooks, the defendant herein, on or about the 18th day of January, 1952, in the City of Oakland, County of Alameda, State of California, within the Southern Division of the Northern District of California, unlawfully did sell, dispense and distrib-

ute, not in or from the original stamped package, a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bindle containing approximately 1 ounce of heroin."

III.

That Toliver was charged in the fourth count of the indictment as follows:

"The Grand Jury further charges: THAT Charles E. Toliver, alias Little Snooks, the defendant herein, at the time and place mentioned in the third count of this indictment, within the Southern Division of the Northern District of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bindle containing approximately 1 ounce of heroin, and the said heroin had been imported into the United States of America contrary to law, as the said defendant then and there knew."

IV.

That Toliver was charged in the fifth count of the indictment as follows:

"The Grand Jury further charges: THAT Charles E. Toliver, alias Little Snooks, the defendant herein, and Abe Brown named herein as co-conspirator but not as a defendant, did conspire together and with diverse other persons, whose names are to said Grand Jury unknown,

to sell, dispense and distribute, not in or from the original stamped package, a quantity of a derivative and preparation of morphine, to-wit, heroin, in violation of Sections 2553 and 2557 of Title 26 United States Code, and to conceal and facilitate the concealment and transportation of a derivative and preparation of morphine, to-wit, heroin, which heroin had been imported into the United States of America contrary to law, as said defendant then and there well knew, in violation of Section 174 of Title 21 United States Code, and thereafter and during the existence of said conspiracy the said defendant, in the Southern Division of the Northern District of California, did the following acts in furtherance of and to effect the objects of the conspiracy aforesaid.

Overt Acts

“1. On March 7, 1953 in the vicinity of 7th and Center Streets, at Oakland, California, defendant Charles E. Toliver, alias Little Snooks, and co-conspirator Abe Brown had a conversation.

“2. On March 11, 1953, at San Francisco, California, the defendant Charles E. Toliver, alias Little Snooks, had a conversation with Narcotic Agent Malcolm Richards.”

V.

That on March 8, 1956 count two of the indictment was dismissed on the motion of petitioner's counsel. A jury trial was held on March 8 and 9, 1956 before Judge O. D. Hamlin. On March 9, 1956 the jury returned a verdict of guilty on counts one, three, four

and five of the indictment and sentence was pronounced on March 12, 1956 by Judge O. D. Hamlin.

VI.

That the petitioner was sentenced to be imprisoned for four years on count one and to be imprisoned for four years on count three, said term of imprisonment imposed on count three to run concurrently with that imposed on count one; and be imprisoned for four years on count four, said term of imprisonment imposed on count four to commence and run from and after the expiration of the term of imprisonment imposed on counts one and three, and be imprisoned for four years on count five, said term of imprisonment to run concurrently with the term of imprisonment imposed on count four and to commence and run from and after the expiration of the term of imprisonment imposed on counts one and three. The petitioner was sentenced to pay a fine of \$1.00 on each of counts one, three, four and five.

VII.

That Toliver appealed from the judgment of conviction in the instant case and the judgment was affirmed in the case of *Charles E. Toliver v. United States* (9th Cir.), 224 F.2d 742.

VIII.

That Toliver contends that the Court lacked jurisdiction to impose consecutive sentence on counts three and four, since the evidence in support thereof involved the same narcotic transaction.

IX.

That Toliver contends that the Court lacked jurisdiction to impose consecutive sentences on counts one and five since the evidence in support of count five, the conspiracy count of the indictment, also supported count one, a substantive violation.

CONCLUSIONS OF LAW.

I.

The motion, files and records of the case conclusively show that the prisoner is entitled to no relief.

II.

Consecutive sentences can be imposed for a violation of the Harrison Narcotic Act, Title 26 U.S.C. §2553, sale of narcotics, and violation of the Jones-Miller Act, Title 21 U.S.C. §174, concealment of narcotics, even though the evidence shows but one transaction was involved.

III.

Consecutive sentences may be imposed for a substantive offense and for a conspiracy to commit it.

IV.

The issues urged by petitioner were decided adversely to him by the Court of Appeals for the Ninth Circuit in his appeal from the judgment of conviction, *Toliver v. United States*, supra.

ARGUMENT.

Appellant in his Section 2255 motion has made the same contentions that were decided adversely to him in his appeal.

This case is, therefore, governed by the case of *Charles E. Toliver v. United States* (9th Cir.), 224 F.2d 742, and the judgment of the District Court should be affirmed.

Dated, San Francisco, California,
July 15, 1957.

LLOYD H. BURKE,

United States Attorney,

JOHN H. RIORDAN, JR.,

Assistant United States Attorney,

RICHARD H. FOSTER,

Assistant United States Attorney,

Attorneys for Appellee.



No. 15510

United States
Court of Appeals
for the Ninth Circuit

FIDALGO ISLAND PACKING COMPANY, a
Corporation, and CLARA WILSON, .

Appellants,

vs.

A. B. PHILLIPS, Executive Director, Employ-
ment Security Commission of Alaska,

Appellee.

Transcript of Record

Appeal from the District Court
for the District of Alaska,
Division Number One.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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COUNSEL OF RECORD

For Plaintiff-Appellant:

H. L. FAULKNER,
P. O. Box 1121,
Juneau, Alaska, and
350 Mills Tower,
San Francisco, California.

For Defendant-Appellee:

J. GERALD WILLIAMS,
Attorney General for Alaska,
Juneau, Alaska, by
DICKERSON REGAN,
Juneau, Alaska.



In the United States District Court for the District
of Alaska, Division Number One, at Juneau

No. 6865-A

FIDALGO ISLAND PACKING COMPANY, a
Corporation,

Plaintiff,

vs.

A. B. PHILLIPS, Executive Director, Employ-
ment Security Commission of Alaska,

Defendant,

CLARA WILSON,

Intervenor.

JUDGMENT ON MANDATE

This cause having come on regularly for trial before the Court on April 27, 1954, upon the complaint of plaintiff and the complaint in intervention of the intervenor, Clara Wilson, and the answers of defendants; and plaintiff and intervenor being represented by their attorney, H. L. Faulkner of Faulkner, Banfield and Boochever, and the defendant being represented by its attorney Edward A. Merdes, Assistant Attorney General of Alaska, and the Court having, before the final hearing was completed, substituted A. B. Phillips as defendant in place of John T. McLaughlin, the original defendant; and evidence having been adduced before the Court on behalf of the parties, and arguments having been made by respective counsel for plaintiff, intervenor and defendant and briefs having been filed, and the

cause having been submitted for judgment and the Court having taken the matter under advisement and having thereafter on May 12, 1954, filed its findings of fact and conclusions of law; and having made and filed herein on May 12, 1954, its judgment and permanent injunction in favor of plaintiff and intervenor and against defendant; and an appeal having been taken by defendant to the United States Court of Appeals for the Ninth Circuit at San Francisco and the Court of Appeals having affirmed the judgment entered by the District Court, and a petition for rehearing having been thereafter filed on behalf of the defendant, and the Court having on June 21st, 1956, rendered an opinion denying the petition for rehearing and having thereafter on the 3rd day of July, 1956, entered its mandate which was thereafter on July 6th, 1956, filed in the above-entitled Court and which mandate is in words and figures as follows:

No. 14505

United States of America—ss.

The President of the United States of America:

To: the Honorable, the Judges of the District Court
for the District of Alaska, First Division,
Greeting:

Whereas, lately in the District Court for the District of Alaska, First Division, before you or some of you, in a cause between Fidalgo Island Packing Company, a Corporation, Plaintiff, and John T.

McLaughlin, Acting Executive Director, Employment Security Commission of Alaska, Defendant, No. 6865-A, a judgment is of record and fully set out in said cause in the office of the Clerk of the said District Court, to which record reference is hereby made and the same is hereby expressly made a part hereof.

And Whereas, A. B. Phillips appealed to this court as by the inspection of the transcript of the record of the said District Court, which was brought into the United States Court of Appeals for the Ninth Circuit by virtue of an appeal agreeably to the Act of Congress, in such cases made and provided, fully and at large appears.

And Whereas, on the 4th day of May, in the year of our Lord, one thousand nine hundred and fifty-five, the said cause came on to be heard before the said United States Court of Appeals for the Ninth Circuit, on the said transcript of record, and was duly submitted:

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed. (September 12, 1955.)

You, Therefore, Are Hereby Commanded that such proceedings be had in said cause, in conformity with the opinion and judgment of this court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness the Honorable Earl Warren, Chief Justice of the United States, the Third day of July in the year of our Lord one thousand nine hundred and fifty-six.

PAUL P. O'BRIEN,

Clerk, United States Court of Appeals for the Ninth Circuit.

It Is Now Hereby Ordered, Adjudged and Decreed that, pursuant to the mandate aforesaid, the above-named defendant and his agents, officers and employees and his and their successors in office and each of them, be and they are hereby enjoined from doing any act or thing for the purpose of enforcing or putting into effect purported regulation No. 10 of the Employment Security Commission of Alaska which is dated June 29, 1953, and which pretends to set up seasons of employment of all those persons and corporations engaged in salmon packing in Alaska, and a copy of which regulation is set forth in the plaintiff's complaint in paragraph 6 thereof and,

It Is Further Ordered, Adjudged and Decreed that all funds of the Employment Security Commission of Alaska in the total sum of \$650,000, impounded by order of the Court of the 25th day of June, 1954, pending the outcome of the appeal of this cause to the United States Court of Appeals, be and they are hereby ordered released from the order impounding them and,

It Is Further Ordered, Adjudged and Decreed that the impounded funds be used by the Employ-

ment Security Commission to pay all claims of employees of the salmon packing industry in the Territory of Alaska filed with the Commission and which became due and payable by virtue of the judgment and decree of this Court of May 12, 1954; and that the excess of the impounded funds, if any, over and above the amount required to pay the aforesaid claims, shall be covered into the regular fund of the Employment Security Commission of Alaska to be made applicable to payment of claims of other bona fide claimants as prescribed by law.

Done in open court this 13th day of August, 1956.

/s/ RAYMOND J. KELLY,
Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed August 13, 1956.

[Title of District Court and Cause.]

ORDER

Pursuant to oral stipulation by counsel in open Court which was reduced to writing by the Court Reporter, it was mutually agreed that the following Order may be entered:

It Is Hereby Ordered

That the "Order for Impounding of Funds Pending Appeal" dated June 25, 1954, filed and entered in this Court on June 25, 1954, and all conditions

therein set forth be, and the same is hereby continued in full force and effect until the United States Supreme Court ultimately disposes of the Appeal taken to it by the Appellant, A. B. Phillips, Executive Director, Employment Security Commission of Alaska, from the judgment of the Court of Appeals of the Ninth Circuit dated June 21, 1956, denying Appellant's Petition for rehearing.

It Is Further Ordered

That execution on the judgment of this Court which judgment was signed and filed on August 13, 1956, pursuant to mandate from the Court of Appeals of the Ninth Circuit be, and the same is hereby stayed until the Supreme Court of the United States ultimately disposes of the Appeal above referred to.

Signed in open Court this 18th day of September, 1956.

/s/ RAYMOND J. KELLY,
District Judge.

Entry of above Order approved:

/s/ JOHN H. DIMOND, of
Faulkner, Banfield & Boochever, Attorneys for Appellees, Fidalgo Island Packing Company and Intervenor, Clara Wilson.

/s/ EDWARD A. MERDES,
Assistant Attorney General of Alaska, Attorney for Appellant, A. B. Phillips, Executive Director, Employment Security Commission of Alaska.

[Endorsed]: Filed September 18, 1956.

[Title of District Court and Cause.]

NOTICE OF SUBMISSION OF ORDER REIN-
STATING JUDGMENT ON MANDATE

To: J. Gerald Williams, Attorney General of
Alaska, attorney for defendant:

Please take notice that an order reinstating the
judgment on the mandate in the above cause, of
which the attached is a true copy, will be submitted
for entry and settlement to the above-entitled Court,
at Juneau, Alaska, on January 18, 1957, at 10 a.m.

Dated: January 7, 1957.

FAULKNER, BANFIELD &
BOOCHEVER,

By /s/ JOHN H. DIMOND,
Attorneys for Plaintiff and
Intervenor.

[Title of District Court and Cause.]

ORDER REINSTATING JUDGMENT
ON MANDATE

This Matter came on before the Court upon the
oral stipulation of counsel for all parties to rein-
state and permit execution upon the judgment on
mandate entered by this Court on August 13, 1956.

It appears to the Court:

1. On July 3, 1956, the United States Court of Appeals for the Ninth Circuit entered its mandate in which the judgment of the District Court of May 12, 1954, was affirmed, which mandate was filed in this Court on July 6, 1956.

2. A judgment on said mandate was entered by this Court on August 13, 1956.

3. On September 18, 1956, this Court entered its order staying execution on the judgment on mandate of August 13, 1956, and continuing in full force and effect the "Order for Impounding Funds Pending Appeal" dated June 25, 1954, until the Supreme Court of the United States had ultimately disposed of the defendant's application for a writ of certiorari.

4. On December 10, 1956, the said application for writ of certiorari was denied by the Supreme Court of the United States.

Now, Therefore, it is hereby Ordered:

1. This Court's order of September 18, 1956, is hereby rescinded and revoked and henceforth shall have no further force and effect.

2. The judgment on mandate of this Court, dated August 13, 1956, is hereby reinstated in full and placed in full force and effect, with the following additional provisions to be added thereto:

(a) The said impounded funds shall be used by the Employment Security Commission not only to pay all claims of employees of the salmon packing

industry in the Territory of Alaska filed with the Commission and which became due and payable by virtue of the judgment and decree of this Court of May 12, 1954, but also to pay interest on said claims at the rate of six (6%) per cent per annum from May 12, 1954.

(b) Plaintiff and intervenor are allowed attorney's fees in the amount of \$.....

Done in Open Court at Juneau, Alaska, this day of, 1957.

.....,

District Judge.

Service of copy acknowledged.

[Endorsed]: Filed January 7, 1957.

[Title of District Court and Cause.]

OPINION

Filed January 21, 1957

This matter is before the Court upon oral stipulation of counsel for all parties to reinstate and permit execution upon the judgment on mandate entered by this Court on August 13, 1956. In addition, counsel for plaintiff requests that interest be allowed thereon at 6% from May 12, 1954, and that the Court allow a reasonable attorney fee.

On June 29, 1953, the then Acting Director of the Employment Security Commission of Alaska

promulgated what was called "Amended Regulation No. 10." This regulation purported to fix and designate seasons of employment in the canned salmon industry in Alaska, which meant that unemployment benefits could be paid to canned salmon employees only during the "seasons," i.e., during the months generally of May through September. Thus, under this regulation, if such employee were out of work between October and May of any year, he would not be eligible to draw unemployment compensation benefits.

This action was commenced on or about July 30, 1953, to enjoin the enforcement of this purported regulation on the ground, principally, that it unlawfully discriminated against the salmon packers in Alaska and their employees in favor of other Alaska employers and their employees—such as the persons in the construction industry. The District Court, on May 7, 1954, filed its opinion sustaining the contentions of plaintiff and intervenor. In this opinion the Court held that the regulation was invalid, was discriminatory in its application and operation, and that plaintiff and intervenor have been irreparably injured and therefore were entitled to an injunction. Hence, on May 12, 1954, the District Court entered its judgment and decree permanently enjoining the Director of the Employment Security Commission, and his agents and employees and successors in office, from——

“* * * doing any act or thing for the purpose of enforcing or putting into effect purported

Amended Regulation No. 10 of the Employment Security Commission of Alaska which is dated June 29, 1953, and which pretends to set up seasons of employment of all those persons and corporations engaged in salmon packing in Alaska* * *”

The opinion of the District Court is reported at 120 F. Supp. 777, 15 Alaska 15.

An Appeal was filed on June 11, 1954, by the Employment Security Commission, and subsequently a stay of execution was issued, tying up the accrued unemployment compensation which became due to the cannery workers when Amended Regulation 10 was declared invalid. In lieu of a supersedeas bond as required by Rule 73(d) FRCP, the sum of \$650,000.00 from the unemployment compensation trust was impounded by this court pending the appeal.

On September 13, 1955, in a per curiam opinion, the Court of Appeals for the Ninth Circuit affirmed the judgment and decree of the District Court. A petition for rehearing was denied on June 21, 1956, and a petition for a writ of certiorari to the United States Supreme Court, filed September 21, 1956, was denied on December 10, 1956.

Thus the benefits to the cannery workers have been delayed nearly three years since the District Court first determined that Amended Regulation No. 10 was invalid, and plaintiff now seeks interest on the benefits, and attorney fees for prosecuting this action. He contends that the scope of the man-

date from the United States Court of Appeals did not include these items and that this Court can, and moreover, it should, make such an award at this time.

The entire Employment Security Act was repealed and re-enacted by Chap. 5 of the First Extraordinary Session Laws of Alaska of 1955. Sec. 1001 thereof provides:

“Section 1001. Non-Liability of Territory. Benefits shall be deemed to be due and payable under this Act only to the extent provided in this Act and to the extent that moneys are available therefor to the credit of the Unemployment Fund, and the liability of the Territory and the Commission shall be limited accordingly.”

The rights and liabilities of the parties herein must be determined by the law as it existed at the time the controversy arose. Sec. 51-5-19 ACLA, 1949, provides:

“Benefits shall be deemed to be due and payable under the Act only to the extent provided in the Act and to the extent that moneys are available therefor to the credit of the Employment Security Fund, and neither the Territory nor the Commission shall be liable for any amount in excess of such sums.”

Sec. 25-1-1 ACLA, 1949, cited by the plaintiff, provides that “The rate of interest in the Territory of Alaska shall be six per centum per annum, and

no more, on all moneys after the same become due* * *”

Section 55-11-51 ACLA, 1949, likewise provides for attorney fees. It reads: “The measure and mode of compensation of attorneys shall be left to the agreement, expressed or implied, of the parties; but there may be allowed to the prevailing party in the judgment certain sums by way of indemnity for his attorney fees in maintaining the action or defense thereto, which allowances are termed costs.”

These general provisions of the law are subject to the limitation that when a sovereign state is involved in a suit, its liability for interest or costs must be specifically set forth in a statute. The designation “sovereign state” would include the Territory of Alaska. See *Territory ex rel McMahon v. O'Connor*, 5 Dak. 397, 41 N.W. 746.

With regard to plaintiff's application for interest, the case of *United States v. North Carolina*, 136 U. S. 211, sets forth the rule that “* * * the State, unless by or pursuant to an explicit statute, is not liable for interest, even on a sum certain which is overdue and unpaid.” This holding has been widely supported in other jurisdictions: *United States v. Nez Perce County, Idaho* (9th Circ., 1938), 95 F 2nd 238; *Boxwell v. Department of Highways*, 14 So. 2nd 627, 203 La. 760; *State Highway Commission v. Mason*, 6 So. 2nd 468, 192 Miss. 576; *Culver v. Commonwealth*, 35 A. 2nd 64, 348 Pa. 472.

A similar rule has been followed by the courts on the question of costs. In *Ridge v. Boulder Creek Union Junior-Senior High School District of Santa Cruz County*, 140 P. 2nd 990, 60 Cal. App. 2nd 453, the Court stated:

“General statutes allowing costs to parties have been construed not to apply to the state in the absence of express provision respecting costs where the state was a party.”

See also *Boland v. Cecil*, 150 P. 2nd 819; *Costs*, 14 Am. Jur., 22, Sec. 34; *Territories*, 86 C.J.S. 647, Sec. 38.

That provisions for interest or costs must be provided for specifically in a statute may be shown not only from the case law on the subject, but also from the wording of the Alaska Employment Security Act itself, Sec. 51-5-19, ACLA, 1949, *supra*. There is no provision for anything in addition to unemployment benefits in Alaska's Employment Security Act.

Plaintiff contends that the suit was brought against the Director of the Employment Security Board as an individual, and that consequently the action does not involve the territory of Alaska. But the Court cannot agree with that distinction. The Commission was performing an essential governmental function, and, in fact, as was pointed out in defendant's brief, the director was acting on legislative mandate in promulgating Amended Regulation No. 10. We must hold that the Director and

the Commission were clothed with the sovereignty of the Territory in connection with the matter. No interest can be awarded nor can any costs be allowed.

Counsel for plaintiff contends that under the salvage doctrine, attorney fees should be awarded from the fund which is recovered. It is well settled that in class suits, such as this one, they are entitled to receive their compensation from that source. Trustees v. Greenough, 105 U. S. 527; Sprague v. Ticonic Nat'l Bank, 307 U. S. 161; Central R. R. & Banking Co. of Georgia v. Pettus, 113 U. S. 116. Since the entire class benefits by the litigation, each member is required to contribute his proportionate share of the expense. This amount is deducted before distribution, as a matter of convenience.

We do not feel that Sec. 55-11-51, ACLA, 1949 (*supra*), creates any obstacle to the application of this doctrine. In leaving the measure and mode of compensation up to the parties, the legislature certainly did not contemplate the restriction of attorney fees to the amount which a single plaintiff could afford, or was willing to pay. By their nature, class suits of this general type involve a number of individuals who have claims which by themselves are not large enough to justify litigation, but which, when prosecuted aggregately, confer a true benefit on the class. The desirability of such a remedy is obvious, but if a reasonable attorney fee is not to be allowed from the judgment, class suits become impractical. No one person could afford to maintain

an action of such large proportions, in view of the limited benefits which he would personally gain.

It is, therefore, the judgment of this Court that the awards which have been recovered in this action should be charged with a reasonable percentage of the amount recovered by each claimant, which will constitute reasonable attorney fees to be awarded to the attorney herein as compensation. The Court finds that 3% is a reasonable amount and should be deducted from each award and paid to the attorney. Order reinstating judgment on the mandate in accordance with this opinion may be prepared and presented to this Court.

/s/ RAYMOND J. KELLY,
U. S. District Judge.

[Endorsed]: Filed January 21, 1957.

[Title of District Court and Cause.]

NOTICE OF TIME FOR SUBMISSION OF
ORDER FOR ENTRY

To: J. Gerald Williams, Attorney General of
Alaska, attorney for defendant:

Please take notice that an "Order Reinstating Judgment on Mandate and for Payment of Attorneys' Fees and Claims," of which the attached is a true copy, will be submitted for entry to the above-entitled Court, at Juneau, Alaska, on February 8, 1957, at 10:00 a.m.

Dated: January 31, 1957.

FAULKNER, BANFIELD &
BOOCHEVER,

By /s/ JOHN H. DIMOND,
Attorneys for Plaintiff and
Intervenor.

[Title of District Court and Cause.]

ORDER REINSTATING JUDGMENT ON MAN-
DATE AND FOR PAYMENT OF ATTOR-
NEYS' FEES AND CLAIMS

This Matter came on before the Court on January 18, 1957, upon the oral stipulation of counsel for all parties to reinstate and permit execution upon the judgment on mandate entered by this Court on August 13, 1956, and upon plaintiff's and intervenor's petition for the payment of interest on the claims of employees of the salmon packing industry in Alaska which became due and payable by virtue of the judgment and decree of this Court on May 12, 1954, and for the allowance of attorneys' fees to be paid to the attorneys for plaintiff and intervenor.

It appears to the Court:

1. On July 3, 1956, the United States Court of Appeals for the Ninth Circuit entered its mandate in which the judgment of the District Court of May 12, 1954, was affirmed, which mandate was filed in this Court on July 6, 1956.

2. A judgment on said mandate was entered by this Court on August 13, 1956.

3. On September 18, 1956, this Court entered its order staying execution on the judgment on mandate of August 13, 1956, and continuing in full force and effect the "Order for Impounding Funds Pending Appeal," dated June 25, 1954, until the Supreme Court of the United States had ultimately disposed of the defendant's application for a writ of certiorari.

4. On December 10, 1956, the said application for writ of certiorari was denied by the Supreme Court of the United States.

5. On January 21, 1957, the Court filed its written opinion denying the petition for payment of interest and costs, and directing that the funds heretofore impounded by order of this Court of June 25, 1954, and now available to pay all claims of employees of the salmon packing industry in Alaska filed with the Employment Security Commission and which became due and payable by virtue of the judgment and decree of this Court of May 12, 1954, be charged with 3% of the amount of each such claim and deducted from each such claim and paid as compensation to plaintiff's and intervenor's attorneys as attorneys' fees, which include expenses of litigation.

Now, Therefore, It Is Hereby Ordered:

1. This Court's order of September 18, 1956, is hereby rescinded and revoked and henceforth shall have no further force and effect.

2. The judgment on mandate of this Court, dated August 13, 1956, is hereby reinstated and placed in full force and effect, subject, however, to the following modifications:

(a) The said impounded funds, in the total amount necessary to pay all claims of employees of the salmon packing industry in Alaska filed with the Commission and which became due and payable by virtue of the judgment and decree of this Court of May 12, 1954, shall be used to pay all such claims, after deducting therefrom the sum of three (3%) per cent thereof as compensation for plaintiff's and intervenor's attorneys.

(b) The present Executive Director of the Employment Security Commission, the successor in office to defendant A. B. Phillips, is hereby ordered to pay said attorneys' fees to plaintiff's and intervenor's attorneys, Faulkner, Banfield & Boochever, of Juneau, Alaska, within 30 days from the date of this order.

(c) The excess of the said impounded funds, over and above the amounts necessary to pay the aforesaid attorneys' fees, expenses and claims, shall be covered into the regular fund of the Employment Security Commission of Alaska to be made applicable to payment of claims of other bona fide claimants as prescribed by law.

(d) Plaintiff's and intervenor's petition for the awarding of interest on the said claims is denied.

Done in Open Court at Juneau, Alaska, this
day of, 1957.

.....,

District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed January 31, 1957.

[Title of District Court and Cause.

PETITION FOR REHEARING

To: The Honorable Raymond J. Kelly, United
States District Judge for the District of Alaska,
Division Number One, at Juneau:

The defendant above named presents this, a Petition for Rehearing of argument upon the limited question of allowance of attorney fees in any way from moneys now in, or required to be deposited in, Alaska's account in the Unemployment Trust Fund including moneys heretofore "impounded" in this action. By this Petition the defendant particularly seeks the opportunity to advise the Court on the effect that entry of an Order based upon its Opinion dated January 21, 1957, would have upon conformity of Alaska to Federal requirements for credits allowable to Alaska employers against their Federal Unemployment Tax.

In Support of This Petition, the defendant respectfully submits the following:

On January 18, 1957, in this Court, hearing was had upon plaintiff's submission of an Order Reinstating Judgment on Mandate. Prior to said hearing and in connection therewith, plaintiff had filed with the Court a Memorandum in Support of Application for Interest and Attorney's Fees and defendant had filed a memorandum in reply thereto, setting out affirmative arguments against allowance of interest and attorney fees. Based upon these memoranda and upon the oral argument thereon heard by this Court on January 18, 1957, the Court on January 21, 1957, filed its Opinion, recognizing that attorney fees are a part of "costs," and that "no interest can be awarded nor can any costs be allowed" against the defendant in this action. It appears from a careful study of the Court's Opinion, however, that the Court felt that an allowance of attorney fees as a deduction from each claim under the "salvage" theory would be proper in law, since it would not conflict with sovereign immunity from the payment of costs (the term to include attorney fees).

In its reply memorandum on this subject at Page 13, defendant made the single statement "It is required * * * that all moneys withdrawn from this [unemployment trust] fund be used exclusively for the payment of benefits and refunds (Section 3304 (a) (4) Internal Revenue Code of 1954)." The defendant feels that it did not, by this single statement, meet its obligation to fully advise the Court of the law as it would apply to a requirement that

the defendant deduct 3% of each claim in this action and pay over the same to plaintiff's attorneys.

For this reason the defendant earnestly submits that a rehearing of argument upon this limited question should be allowed, in order that this Court have an opportunity to study the complicated Federal law which imposes an absolute prohibition against the defendant's paying out the moneys in question in the manner and for the purpose which the Court, in its Opinion filed January 21, 1957, holds to be proper.

The defendant further submits that, since major questions of law affecting the content of the proposed Order Reinstating Judgment on Mandate are to be argued and developed in rehearing, entry of such Order should be delayed until the Court has been fully advised in the matter by way of rehearing.

Filed herewith in the form of a memorandum of law is a summary of the matters defendant wishes to present to the Court in rehearing.

Respectfully submitted this 12th day of February, 1957.

J. GERALD WILLIAMS,
Attorney General of Alaska.

By /s/ EDWARD A. MERDES,
Assistant Attorney General.

Receipt of copy acknowledged.

[Endorsed]: Filed February 13, 1957.

[Title of District Court and Cause.

ORDER FOR REHEARING

The Court having considered defendant's Petition for Rehearing and defendant's Memorandum in support thereof, and

It Appearing to the Court that major questions of law affecting the contents of the proposed Order Reinstating Judgment on Mandate have not yet been presented to the Court, Therefore,

It Is Hereby Ordered That at the hour of 4 o'clock p.m., February 21, 1957, in this Court, argument will be heard upon the limited question of allowance of attorney fees in any way from moneys now in, or required to be deposited in, Alaska's account in the Unemployment Trust Fund, including moneys heretofore "impounded" in this action.

Notice Is Given That entry of an Order Reinstating Judgment on Mandate will be delayed until after the Court has heard said arguments.

Dated at Juneau, Alaska, this 13th day of February, 1957.

/s/ RAYMOND J. KELLY,
District Judge.

Receipt of copy acknowledged.

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated and agreed by all the parties hereto through their attorneys as follows:

That the total number of claimants claiming the benefits involved in this case is approximately 2,350; that the total number of separate claims filed is approximately 18,000; and the approximate amount of all claims is \$509,000.

It is further stipulated that these amounts may vary slightly after full and accurate computation and it is also stipulated that this stipulation may be filed in court and become a part of the record for the purpose of settling the matters in connection with the entry of final judgment on the mandate.

Juneau, Alaska, February 12, 1957.

/s/ JOHN H. DIMOND,

/s/ H. L. FAULKNER,

Attorneys for Plaintiff and
Intervenor.

/s/ J. GERALD WILLIAMS,

/s/ DICKERSON REGAN,

Attorneys for Defendant.

[Endorsed]: Filed February 15, 1957.

[Title of District Court and Cause.]

MOTION FOR ORDER OF ABATEMENT

Pursuant to Rule 25 (d), FRCP, the Defendant moves the Court for an Order declaring the above-entitled action abated for the reason that

(1) The Defendant, A. B. Phillips, then Executive Director of the Employment Security Commission of Alaska, resigned said office effective with the close of business, April 15, 1955.

(2) His successor, Arthur A. Hedges, assumed the office of Acting Executive Director effective April 16, 1955, and

(3) No substitution of Arthur A. Hedges, or any other successor in office of A. B. Phillips, as defendant in this action has been made, although the period of six months following the date when the successor of A. B. Phillips took office has long since expired.

This motion is supported by an affidavit of James B. Cauley, Fiscal and Personnel Officer of the Alaska Employment Security Commission, and by the first section of Defendant's Reply to Plaintiff's Memorandum filed February 23, 1957, which affidavit and reply memorandum are filed herewith.

Dated at Juneau, Alaska, February 28, 1957.

/s/ J. GERALD WILLIAMS,
Attorney General of Alaska,
Attorney for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed February 28, 1957.

[Title of District Court and Cause.]

OPINION

Filed March 14, 1957

This matter comes before the Court upon the petition of defendant for a rehearing upon the question of allowance of attorney fees in any way from moneys now in or required to be deposited in Alaska's account in the unemployment trust funds, including money heretofore impounded in this action. The defendant admits in its petition that it did not fully advise the Court on the law as it would apply to a requirement that the defendant deduct a percentage of each claim in this action and pay the same over to plaintiff's attorney as compensation for the services rendered in procuring the benefits for all these claimants under the "salvage" theory. This theory, as argued by counsel for plaintiff at the hearing, would not conflict with the sovereign's immunity from the payment of costs and taxable attorney fees. Counsel for defense did not argue against this proposal of plaintiff's counsel at the former hearing and mentioned only briefly in his memorandum filed in connection therewith that the law required that all moneys withdrawn from the unemployment trust fund must be used exclusively for the payment of benefits and refunds, so in effect the question here involved is now before the Court for the first time.

Rehearing was granted and on the argument counsel for plaintiff pointed out that Sec. 762 of the

Employment Security Act of the Extraordinary Session Laws of Alaska, 1955, authorizes the Court to designate attorney fees. It should be pointed out that the provisions of the Act as amended in 1955 are applicable on the question of attorney fees, notwithstanding the fact that the substantive rights of the parties were governed by the law as it existed when the controversy arose. See *Hogan v. Ingold* (Cal., 1952), 243 P. 2d 1, 96 ALR 1428.

Section 762 provides in part as follows:

“Limitation of Fees. No individual claiming benefits shall be charged fees of any kind in any proceeding under this Act by the Commission or its representatives, or by any Court or any officer thereof. Any individual claiming benefits in any proceeding before the Commission or its representatives or a court may be represented by counsel or other duly authorized agent; but no such counsel or agent shall either charge or receive for such services more than an amount approved by the Commission or the court * * *

It would surely seem that the authorization of attorney fees by the Court as well as the Commission is contemplated in appeals by individual claimants from decisions of the Commission, but in the present case, the Fidalgo Island Packing Co. cannot be considered as a claimant within the meaning of the statute, since it merely sought an injunction forbidding the enforcement of amended regulation 10.

This Court, in the Opinion filed herein on January 21, 1957, and to which reference is hereby made, held that provisions for interest or costs in a case against the sovereign must be provided for specifically in a statute; that there is no provision for anything in addition to unemployment benefits in Alaska's Employment Security Act in effect at the time this action arose and that the Director and the Commission were clothed with the sovereignty of the Territory of Alaska and that no interest could be awarded nor could attorney fees as costs be allowed.

The Court then went on in that Opinion to hold on the basis of plaintiff's brief and arguments at the hearing that under the "salvage" doctrine, attorney fees should be awarded from the funds which were recovered for each claimant and although it is well settled that in class suits attorneys would be entitled to receive their compensation in that manner, the Court is compelled to change its holding on this particular matter because Section 763 of the Alaska Employment Security Act, *supra*, provides as follows:

"Exemption of Benefits. Any assignment, pledge, or encumbrance of any rights to benefits which are or may become due or payable under this Act shall be void; and such rights to benefits shall be exempt from levy, execution, attachment, or any other remedy whatsoever provided for the collection of debt; and benefits received by any individual, so long as they are

not mingled with other funds of the recipient, shall be exempt from any remedy whatsoever for the collection of all debts except debts incurred or necessities furnished to such individual or his spouse or dependents during the time when such individual was unemployed. Any waiver of any exemption provided for in this section shall be void.” (Emphasis supplied.)

It seems to the Court that the important provision of this section, so far as this hearing is concerned, is the following:

“* * * so long as they are not mingled with other funds of the recipient.”

Until the funds become so mingled, the exemptions listed in Sec. 763 (*supra*) preclude the impressing of the benefits due the claimants with any lien whatsoever. These funds have not been so mingled and cannot be until they have been actually paid over to each claimant. This Court was therefore incorrect in holding that the “salvage” theory as advanced by plaintiffs could apply to unemployment compensation benefits.

The legislature has determined that although the Court may decide what is a just attorney fee, the social purpose of the Employment Security Act would be impaired if the attorney fee were to constitute a lien upon the benefits. The Court has no choice but to take the law as it finds it. It is clear that the allowance of attorney fees as ordered by this Court is forbidden by the statute, and accord-

ingly the decree of January 21, 1957, must be modified to that extent.

Counsel for plaintiffs presented very potent arguments based on the extensive power of an equity court and correctly observed that the equitable maxim that "equity follows the law" is more honored in the breach than the observance. However, the maxim quoted is strictly applicable whenever the rights of the parties are clearly defined and established by statute, and courts of equity cannot disregard statutory provisions any more than courts of law. Whenever the rights of the parties are clearly governed by rules of law, courts of equity will follow such legal rules.

Defendant also files in connection with this hearing a Motion for Order of Abatement in which the defendant moves for an Order declaring the above-entitled action abated for the reason that the defendant, A. B. Phillips, who was Executive Director of the Employment Security Commission of Alaska, resigned said office April 15, 1955. Defendant admits that the Court recognized this action as one against the sovereign, the Territory of Alaska, but claims that under Rule 25(d), F.R.C.P., an action is abated when six months expire after the resignation of an individual officer of the sovereign without substitution of a successor as defendant. This question, likewise, is raised for the first time at this hearing.

This Court feels, however, that it is not within its province at this time to consider this question,

as this entire proceeding is before us on a mandate of the 9th Circuit Court of Appeals. I feel that it is the duty of this Court to enter a decree in conformity with the appellate court's mandate, and to do nothing contrary to it or vary it in any way.

In Re Sanford Fork & Tool Co.,

160 U. S. 247;

Clarke v. Hot Springs Electric Light &
Power Co., 76 F. 2d 918; certiorari denied,
296 U. S. 624

A distinction must be made between the requested declaration of abatement and our former action of allowing attorney fees. It is well settled that the trial court may consider the question of attorney fees when acting upon the mandate of an appellate court, if such discretion is expressly or impliedly conferred in the mandate. *Sprague v. Ticonic National Bank*, 307 U. S. 161. While the consideration of attorney fees is a collateral proceeding, the matter of abatement directly involves the validity of the mandate, and it cannot be considered without leave of the Court of Appeals. See *In re Potts*, 166 U. S. 263.

Motion for Order of Abatement is denied. Order reinstating Judgment on the Mandate, without interest, costs, or attorney fees, may be presented in accordance with this opinion.

/s/ RAYMOND J. KELLY,

U. S. District Judge.

[Endorsed]: Filed March 14, 1957.

In the District Court for the District of Alaska,
Division Number One, at Juneau

No. 6865-A

FIDALGO ISLAND PACKING COMPANY, a
Corporation,

Plaintiff,

vs.

A. B. PHILLIPS, Executive Director, Employ-
ment Security Commission of Alaska,

Defendant,

CLARA WILSON,

Intervenor.

ORDER REINSTATING JUDGMENT OF MANDATE

This Matter came on before the Court upon presentation to the Court by plaintiff and intervenor of a proposed Order reinstating the judgment on the mandate entered by this Court on August 13, 1956, and requesting allowance of attorney's fees and upon the objections of defendant to allowance of attorney fees as provided for in the Court's Opinion filed January 21, 1957, or otherwise; and upon the petition of defendant for a rehearing upon the question of allowance of attorney fees in any way from moneys now in, or required to be deposited in, Alaska's account in the Unemployment Trust Fund or from the Administrative fund of defendant including moneys heretofore impounded herein, and upon defendant's motion for an order of abatement.

It appears to the Court:

1. On July 3, 1956, the United States Court of Appeals for the Ninth Circuit entered its mandate in which the judgment of the District Court of May 12, 1954, was affirmed, which mandate was filed in this Court on July 6, 1956.

2. A judgment on said mandate was entered by this Court on August 13, 1956.

3. On September 18, 1956, this Court entered its order staying execution on the judgment on mandate of August 13, 1956, and continued in full force and effect the "Order for Impounding Funds Pending Appeal," dated June 25, 1954, until the Supreme Court of the United States had ultimately disposed of the defendant's application for a writ of certiorari.

4. On December 10, 1956, the said application for writ of certiorari was denied by the Supreme Court of the United States.

5. On January 21, 1957, the Court filed its written opinion denying plaintiff's and intervenor's petition for payment of interest and costs, but providing for an attorney's fee to be deducted from each claim which became payable by virtue of the judgment and decree of this court on May 12, 1954.

6. On March 14, 1957, after hearing of argument upon the allowance of attorney's fees, the Court filed its written opinion providing for reinstatement of Judgment on the Mandate, without interest, costs or attorney's fees and denying defendant's Motion for Order of Abatement.

Now, Therefore, It Is Hereby Ordered:

1. This Court's judgment on the Mandate, dated August 13, 1956, is hereby reinstated with the following exceptions: That the funds impounded in this action by order of the Court, dated June 25, 1954, be held impounded under that Order for a period of thirty days from the date hereof, and if, at the expiration of that period, no appeal is taken by plaintiff and intervenor from this Judgment and Order to the U. S. Court of Appeals for the Ninth Circuit, the impounded funds be released, and so much thereof as may be necessary to satisfy in full the pending claims of all claimants, according to their respective claims, be paid them forthwith by the defendants. If an appeal is taken within thirty days, all impounded funds shall remain impounded pending the outcome of the appeal or the further Order of this Court.

2. No interest, costs or attorneys' fees are allowed to plaintiff or intervenor.

3. Defendant's Motion for Order of Abatement is denied.

Done in Open Court, at Juneau, Alaska, March 19, 1957.

/s/ RAYMOND J. KELLY,
District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed March 19, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Given that Fidalgo Island Packing Company, plaintiff above named, and Clara Wilson, intervenor, hereby appeal to the United States Court of Appeals for the Ninth Circuit, from the order reinstating judgment on mandate, signed and filed herein on March 19, 1957, and from that portion thereof only, which denies interest and attorney's fees and from the refusal of the court to enter the form of order to reinstate the judgment on the mandate which was submitted to the court by plaintiff and intervenor on January 7, 1957.

Dated at Juneau, Alaska, this 2nd day of April, 1957.

FAULKNER, BANFIELD &
BOOCHEVER,

By /s/ H. L. FAULKNER,

By /s/ JOHN H. DIMOND.

Receipt of copy acknowledged.

[Endorsed]: Filed February 3, 1957.

[Title of District Court and Cause.]

STIPULATION RE PRINTING OF RECORD
AND USE OF PRINTED RECORD ON AP-
PEAL IN FORMER HEARING

It Is Stipulated and agreed between counsel for plaintiff and intervenor and for defendant that in

the printing of the record in this case for use on appeal the title and number of the cause may be omitted from all papers except the first paper appearing in the record and that there be inserted only the words "Title of District Court and Cause."

It Is Further Stipulated, in the consideration of this case on appeal in the United States Court of Appeals for the Ninth Circuit, that reference may be made to the printed record in Cause No. 14,505 entitled A. B. Phillips, Executive Director, Employment Security Commission of Alaska, Appellant, vs. Fidalgo Island Packing Company, a Corporation, and Clara Wilson, Intervenor, Appellees, and that reference may be made by appellants and appellees to any or all portions of that record in the preparation of their briefs and in the argument and that the court may consider that printed record for its own information on any point involved in the appeal where reference may be necessary to the printed record in that case.

Dated at Juneau, Alaska, this 2nd day of April, 1957.

FAULKNER, BANFIELD &
BOOCHEVER,

By /s/ JOHN H. DIMOND,

By /s/ H. L. FAULKNER,

Attorneys for Appellant and
Intervenor.

/s/ DICKERSON REGAN,

Of Attorneys for Appellee.

[Endorsed]: Filed February 3, 1957.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK
RE DOCKET ENTRIES

I, J. W. Leivers, Clerk of the District Court for the District of Alaska, Division Number One, do hereby certify:

That in the above-entitled case the docket entries in the office of the Clerk of the Court, made from and after August 13, 1956, show the following items:

August 13, 1956—Judgment on Mandate, signed and filed.

September 18, 1956—Order staying judgment on mandate and execution pending application to Supreme Court for writ of certiorari.

September 25, 1956—Motion of defendant for order to release part of impounded funds.

September 28, 1956—Order denying motion for release of impounded funds.

January 7, 1957—Form of order to reinstate judgment on mandate with modification, filed by plaintiff and intervenor.

January 18, 1957—Motion called on motion calendar to hear plaintiff's motion to sign amended judgement on mandate.

January 21, 1957—Opinion filed denying interest to claimants and allowing reinstatement of judgment

on mandate with attorney's fee of three per cent of the amount of all claims, to be deducted from the claims of claimants.

February 13, 1957—Defendant's petition for rehearing on opinion of January 21, 1957, filed, and order for hearing on petition filed and entered.

February 28, 1957—Motion of defendant for order of abatement, argument on this motion and defendant's petition for rehearing.

March 14, 1957—Second opinion of court reversing former opinion and denying attorney's fees and denying defendant's motion for abatement.

March 18, 1957—Form of order reinstating judgment on mandate with modifications in accordance with court's second opinion, filed.

March 19, 1957—Court signed order reinstating judgment on mandate, disallowing interest and attorney's fees and denying defendant's motion for abatement and continuing impoundment of funds pursuant to the order of this court of June 25, 1954, for a period of 30 days additional.

Dated at Juneau, Alaska, this 3rd day of April, 1957.

[Seal] /s/ J. W. LEIVERS,
Clerk of the District Court, District of Alaska
Division Number One.

Receipt of copy acknowledged.

[Endorsed]: Filed February 3, 1957.

[Title of District Court and Cause.]

COST BOND ON APPEAL

The above-named plaintiff Fidalgo Island Packing Company and Clara Wilson, intervenor, as principals, and the United States Fidelity & Guaranty Company, a Maryland corporation, as surety, jointly and severally acknowledge that they and their successors, assigns, executors and administrators are jointly and severally bound unto the above-named defendant in the sum of \$250.00.

The condition of this bond is as follows:

Whereas, the plaintiff, Fidalgo Island Packing Company, a corporation, and Clara Wilson, intervenor, have appealed to the United States Court of Appeals for the Ninth Circuit from the final judgment and order reinstating the judgment on the mandate, which order of reinstatement is dated March 19, 1957;

Now, Therefore, if the above-named plaintiff and intervenor shall prosecute their appeal to effect and pay all costs that may be adjudged against them or either of them, if the appeal is dismissed or the judgment and order are affirmed then this bond shall be void; otherwise, to be and remain in full force and effect.

Dated at Juneau, Alaska, this 3rd day of April, 1957.

FIDALGO ISLAND PACKING
COMPANY,

A Corporation;

By /s/ H. L. FAULKNER,

Its Agent and Attorney;

CLARA WILSON,

Intervenor;

By /s/ H. L. FAULKNER,

Her Agent and Attorney,

Plaintiff and Intervenor.

[Seal]

UNITED STATES FIDELITY
& GUARANTY COMPANY,

By /s/ [Indistinguishable],

Agent and Attorney-in-Fact.

Executed in the presence of Jennie S. Hartman.

Receipt of copy acknowledged.

[Endorsed]: Filed February 3, 1957.

[Title of District Court and Cause.]STATEMENT OF POINTS TO BE
RELIED ON BY APPELLANTS

The appellants, the plaintiff and intervenor in the above-entitled cause, propose on their appeal to the U. S. Court of Appeals for the Ninth Circuit to rely on the following points as error:

1. The court erred in denying interest to the claimants as proposed in the order of plaintiff and intervenor presented to the court and dated January 7, 1957.

2. The court erred in denying interest to the claimants in the above-entitled cause as set forth in the opinion of the court of January 21, 1957.

3. The court erred in the opinion of March 14, 1957, in denying interest to claimants and in deny

ing attorney's fees to appellants either under the salvage doctrine as discussed in the court's first opinion of January 21, 1957, or from the administrative fund of defendant and the Employment Security Commission of Alaska by holding that the plaintiff was not a claimant.

4. The court erred in refusing to allow interest or attorney's fees in the order reinstating the judgment on the mandate, which order is dated and filed March 19, 1957.

Dated at Juneau, Alaska, this 2nd day of April, 1957.

FAULKNER, BANFIELD &
BOOCHEVER,

By /s/ JOHN H. DIMOND,

By /s/ H. L. FAULKNER,

Attorneys for Plaintiff and
Intervenor.

Receipt of copy acknowledged.

[Endorsed]: Filed February 3, 1957.

[Title of District Court and Cause.]

ORDER CONTINUING THE IMPOUNDMENT
OF FUNDS PENDING APPEAL

In the above-entitled cause it appearing to the court that on June 25, 1954, this court made an order impounding the sum of \$650,000 to pay the claims of claimants which would be due and payable to them under the judgment of this court if affirmed by the United States Court of Appeals, and

It appearing that the judgment was affirmed and the Supreme Court of the United States denied certiorari and that the sum of approximately \$509,000 is due claimants as a result of this action and in accordance with the opinions and judgments herein of this court and the Court of Appeals, and that there may be involved in the appeal the question of interest on these claims, and

It further appearing that defendant will be in no wise affected if the impoundment of the funds is continued pending the appeal,

Now, Therefore, on motion of the attorneys for plaintiff and intervenor presented to the court pursuant to the rules of the court, it is hereby Ordered:

That pending the outcome of the appeal to the U. S. Court of Appeals on the matter of attorney's fees and interest, execution on the judgment be stayed, and the funds impounded by the order of this court of January 25, 1954, be continued to be held and impounded pursuant to the terms of that order until the United States Court of Appeals for the Ninth Circuit has disposed of the appeal now pending.

Done in Open Court this 5th day of April, 1957.

/s/ RAYMOND J. KELLY,
Judge.

Approved as to form, and copy received this 5th day of April, 1957.

/s/ DICKERSON REGAN,
Of Attorneys for Defendant.

[Endorsed]: Filed April 5, 1957.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

I, J. W. Leivers, Clerk of the District Court for the Territory of Alaska, First Division thereof, do hereby certify that the hereto-attached pleadings are the original pleadings and Order of the Court filed in the above-entitled action and are the ones designated by the parties hereto to constitute the record on appeal.

In witness whereof, I have hereunto set my hand and caused the seal of the above-entitled Court to be affixed at Juneau, Alaska, this 5th Day of April, 1957.

[Seal] /s/ J. W. LEIVERS,
Clerk of District Court.

[Endorsed]: No. 15510. United States Court of Appeals for the Ninth Circuit, Fidalgo Island Packing Company, a Corporation, and Clara Wilson, Appellants, vs. A. B. Phillips, Executive Director, Employment Security Commission of Alaska, Appellee. Transcript of Record. Appeal from the District Court for the District of Alaska, Division Number One.

Filed April 8, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.



No. 15,510

United States Court of Appeals
For the Ninth Circuit

FIDALGO ISLAND PACKING COMPANY, a Corporation, and CLARA WILSON, Intervenor,
Appellants,
vs.

A. B. PHILLIPS, Executive Director, Employment Security Commission of Alaska,
Appellee.

Appeal from the District Court for the District of Alaska,
Division Number One.

BRIEF FOR APPELLANTS.

FAULKNER, BANFIELD & BOOCHEVER,
JOHN H. DIMOND,
H. L. FAULKNER,
P. O. Box 1121, Juneau, Alaska,
Attorneys for Appellants.

FILED

MAY - 7 1957

PAUL P. O'BRIEN, C



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No. 15,510

United States Court of Appeals For the Ninth Circuit

FIDALGO ISLAND PACKING COMPANY, a Corporation, and CLARA WILSON, Intervenor,
Appellants,

VS.

A. B. PHILLIPS, Executive Director, Employment Security Commission of Alaska,
Appellee.

Appeal from the District Court for the District of Alaska,
Division Number One.

BRIEF FOR APPELLANTS.

JURISDICTION.

This is an action on an application of appellants in the District Court for the District of Alaska, Division Number One, for interest and attorneys' fees on a judgment in the case of Fidalgo Island Packing Company, plaintiff, and Clara Wilson, Intervenor, v. A. B. Phillips, Executive Director, Employment Security Commission of Alaska. The District Court on January 21, 1957, on this application, which was actually an application for the reinstatement of the judgment on the mandate with certain modifications, held that interest could not be recovered on the amounts in-

volved in the above mentioned case, but awarded an attorneys' fee of 3% of the amounts of the claims involved in the case to be paid out of the claims under the salvage doctrine (R. 11-18). On rehearing the District Court reversed its order of March 14, 1957, and held that neither interest nor attorneys' fees could be recovered (R. 28-33).

An appeal was taken on April 2, 1957, by filing with the District Court a notice of appeal (R. 37). The jurisdiction of the District Court rests upon the Act of June 6, 1900, 31 Stat. 322, as amended; 48 U.S.C.A. sec. 101 and the jurisdiction of this Court on section 1291 of the New Federal Judicial Code.

STATEMENT AND HISTORY OF THE CASE.

The issues before this Court at this time are fairly simple and they concern only the allowance of attorneys' fees and interest in connection with the judgment already obtained, but in order to assist the court, we think a brief outline of the history of the case may be helpful.

This case was before this Court on the merits in 1955 (see printed record, Cause No. 14,505). It has been stipulated that the printed record in that case may be referred to by both parties on this appeal and may be used by this Court wherever necessary (R. 37-8).

The District Court for the First Judicial Division of Alaska had on May 12, 1954, entered a judgment in

Case No. 14,505 in favor of appellants (120 Fed.Supp. 777). The action was brought to enjoin the enforcement of a pretended regulation made by the Executive Director of the Alaska Employment Security Commission. The court in its opinion and judgment held the regulation to be void and as a result of that, certain payments which had been denied to claimants, who were employees of salmon canneries in Alaska, became due for unemployment compensation in the sum of \$509,000 (R. 26). There are 2350 claimants; 18,000 separate claims, and these total the sum of \$509,000.

The appellee in this case, who was the appellant in Case No. 14,505, appealed to this Court and the judgment of the District Court was affirmed on September 13, 1955 (230 Fed.2d 638). Thereafter the above named appellee, who was then the appellant, filed a petition for rehearing which was denied by this Court on June 21, 1956 (238 Fed.2d 234). Then the appellee herein applied to the Supreme Court of the United States for certiorari and this was denied on December 10, 1956 (77 Supreme Court Reporter, 262, Advance Sheets). The record in the District Court and in this Court in Cause No. 14,505, pages 3-17, inclusive, will show that the action was brought by plaintiff and intervenor on their own behalf and in behalf of all others in Alaska engaged in packing salmon, employers and employees, to enjoin the enforcement of this void regulation hereinafter mentioned, which was made in June, 1953, by the Acting Director of the Alaska Employment Security Commission.

That pretended regulation, if valid, would have deprived all employees in the salmon canning industry of the unemployment compensation benefits to which they were entitled under the law, in the sum hereinabove mentioned, namely, \$509,000. Both plaintiff and intervenor alleged and proved and the court found irreparable damage would result if the enforcement of the regulation were not enjoined. The permanent injunction of the District Court is found in the printed record in Case No. 14,505 at page 65.

After this Court had affirmed the judgment of the District Court (230 Fed.2d 638) and had on June 21, 1956, denied a rehearing, a judgment on the mandate was entered by the District Court at Juneau on August 13, 1956. Counsel for the Employment Security Commission prior to the entry of this judgment on the mandate had announced his intention of applying to the United States Supreme Court for certiorari. On September 18, 1956, on application of the appellee herein, the District Court entered an order staying execution on the judgment pending the Supreme Court's decision on the petition for certiorari (R. 7-8).

When the appeal was taken in 1954 from the decision of the District Court granting the permanent injunction, this appellee applied for leave to appeal without a supersede as bond. The trial court did not grant this request, and then by stipulation the sum of \$650,000, which was in the custody of the Treasurer of the United States to the credit of the Employment Security Commission of Alaska, was impounded pend-

ing the final outcome of the case and in order to protect the claimants in the payment of their claims pursuant to the lower court's judgment in case it were affirmed by this Court (pages 72-75, Printed Record in Case No. 14,505). These funds are still impounded (R. 43-4).

After the Supreme Court had denied certiorari in December, 1956, the appellants herein, plaintiff and intervenor, applied on January 7, 1957, to the District Court for reinstatement of the judgment on the mandate with an addition thereto allowing attorneys' fees and interest on the claims (R. 9-11). The application was made by presentation of a proposed form of judgment and on oral stipulation as to time and procedure. The matter was heard before the District Court at Juneau on January 18, 1957 (R. 11, 39).

On January 21, 1957, the District Court rendered an opinion in which interest was denied to the claimants and an attorneys' fee was ordered to be paid out of the impounded funds and deducted from the several claims of the claimants at the rate of 3% (R. 11-18). Thereafter on January 31, 1957, the appellants filed a notice of proposed order reinstating the judgment on the mandate and allowing the attorneys' fees as ordered by the court in its opinion of January 21, 1957. To this notice was attached a form of order (R. 19-22). Before anything was done with this order and on February 12, 1957, appellee herein filed a petition for rehearing and the court thereupon set the motion for the rehearing for argument on February 21, 1957 (R. 22-25).

On March 14, 1957, the District Court rendered another opinion in which the first opinion, that of January 21, was reversed as to attorneys' fees and the fee was denied (R. 28-33). Then on March 19, 1957, the court signed and entered an order reinstating the judgment on the mandate, which specifically states that no interest or attorneys' fees may be allowed (R. 34-36). The Commission has handled the defense to this case from the beginning and has considered itself the real party in interest. It has prosecuted all the appeals.

QUESTIONS PRESENTED.

This case does not present a question of whether the District Court had rightfully or wrongfully exercised its discretion. The court in its opinion of January 21, 1957, while placing a very modest value on the attorneys' services, considering the work involved and the considerable expense which was paid by plaintiff and intervenor, did recognize that an attorneys' fee should be paid. If the court had exercised its discretion and held that notwithstanding the record and the vast amount of work done and expense paid, the attorneys were not entitled to any remuneration or reimbursement, this Court might not want to disturb the final judgment unless it found that there was an abuse of discretion. We do not think there was any abuse of discretion in the case, because what the District Court held was, regardless of the work done and expense incurred, he could not allow any fee or interest because of the statutes of Alaska which will be herein-

after discussed. Therefore, briefly stated, the two questions presented are:

1. Whether the District Court erred in denying interest on claimants' claims from the time they became payable, and

2. Whether the District Court in its second opinion dated March 14, 1957, erred in denying attorneys' fees which include expenses of litigation and which appellants claim should have been allowed either under the salvage doctrine or under the provisions of section 762 or 814, Chapter 5, Ex. Sess., Laws of Alaska, 1955.

SPECIFICATIONS OF ERROR.

The District Court erred:

1. In denying interest to the claimants as proposed in the order of plaintiff and intervenor presented to the court and dated January 7, 1957.

2. In denying interest to the claimants in the above entitled cause as set forth in the opinion of the court of January 21, 1957.

3. In the opinion of March 14, 1957, in denying interest to claimants and in denying attorneys' fees to appellants either under the salvage doctrine as discussed in the court's first opinion of January 21, 1957 or from the administrative fund of defendant and the Employment Security Commission of Alaska by holding that the plaintiff was not a claimant.

4. In refusing to allow interest or attorneys' fees in the order reinstating the judgment on the mandate, which order is dated and filed March 19, 1957.

SUMMARY OF ARGUMENT.

I.

The District Court erred in refusing in its opinions of January 21 and March 14, 1957, to allow claimants interest on their claims during the period payment was withheld (R. 11, 28, 34). The error consists in the holding that this is in effect a suit against the Territory, and that the Territory, in the absence of a statute providing for interest, is, by reason of its sovereign immunity, exempt from payment of interest.

This is error for two reasons: first, it is not a suit against the Territory since the Territory gets neither advantage nor disadvantage from the litigation. The only parties interested or affected are employers and employees, and all claimants on whose behalf the action was brought; and second, even if the Territory were a party, as was said by this Court in *Mullaney v. Hess*, 189 Fed.2d 417 at 420-1, in dealing with interest from the Territory of Alaska on tax refunds:

“We think that the weight of authority is that interest is recoverable on tax refunds in the absence of express statutory authority therefor.”

II.

The court erred in its second opinion of March 14, 1957, in reversing the opinion of January 21, 1957, and holding that attorneys' fees including expenses of litigation could not be allowed either under the salvage doctrine, because of the provisions of Section 763, Ch. 5, Extraordinary Session Laws of Alaska 1955, or under the provisions of Sections 762 or 814 of the same statute.

The court's conclusion that the salvage doctrine did not apply seems to be contrary to the decision of the U.S. Supreme Court in *Sprague v. Ticonic National Bank*, 307 U.S. 161, and the Alaska statute cited by the court, i.e., Section 763, Ch. 5, Ex. Session Laws 1955, does not affect the allowance of attorneys' fees and expenses under the circumstances here, to be deducted from the claims, and there is nothing in that statute which would make the *Sprague* case inapplicable.

The court's failure to apply Sections 762 and 814, Ch. 5, Ex. Session Laws 1955, is based on the statement in the Opinion of March 14 (R. 29) that plaintiff is not a claimant within the meaning of those statutes. However, this is a class suit and it was brought on behalf of all claimants. It is true that plaintiff was not a claimant to benefits, but the intervenor was, and all other claimants were joined as plaintiffs.

III.

The court erred in entering the judgment of March 19, 1957, insofar as it denied interest and attorneys' fees (R. 34-36).

IV.

The defendant has no interest in the question of allowance of attorneys' fees, under the salvage doctrine, from the amounts due claimants. This is for the reason that it does not affect the total amount which they must pay from the impounded funds. They must, in any event, pay the full amount of the claims,

whether it is 97% to the claimants and 3% to plaintiff and intervenor as attorneys' fees, or 100% to the claimants. Only the claimants are affected by this, and it is significant that none of them has at any time raised any objections. (See Rule 71 F.R.C.P.)

V.

If interest is allowed on the claims, from the time they became due, and the court could, for any reason, hold that attorneys' fees are not payable from the claims themselves, they should be deducted from the interest. Emphasis herein is ours.

ARGUMENT.

(1) INTEREST.

Judge Kelly, in the opinion of the District Court of January 21, 1957 (R. 11-18) sets forth briefly the chronology of the pertinent proceedings in this long drawn out case. In fairness to him we must state that he gave the questions presented to him careful and painstaking consideration, although we cannot agree with his conclusions. The printed record in Cause 14,505 and the files of this Court show that defendant took the full time allowed by law and the Rules, to appeal, to apply for rehearing, and to file petition for certiorari. During all the time required to get a final adjudication, the payment of claimants' compensation has been delayed. It is now almost 3 years since Judge Folta held, on May 7, 1954, that the Reg-

ulation of Defendant, which would have deprived them of their claims, was invalid, thereby establishing these claims and opening the door to their payment.

The funds for payment of the claims were impounded by order of the District Court of June 25, 1954. Under the law all Employment Security funds are kept in the Treasury of the United States and drawn out from time to time on requisition of the Employment Security Commission. The United States uses these funds and pays interest on them (Sec. 1104, Title 42, U.S.C.A. pocket part). The amounts on deposit are averaged monthly and the rate is fixed at the average rate paid by the United States on its obligations. We do not know just how much interest was credited by the Treasurer to the impounded funds, but at even as little as 2%, it would be over \$10,000 a year. The defendant and the Commission must have received this by reason of holding off so long from paying any part of the claims. It would seem to be a case of unjust enrichment, and the Commission gained this considerable sum of interest at the expense of claimants, for they were entitled to receive their claims in May, 1954.

It may be contended that this has no bearing on the asserted legal right of claimants to interest on their claims but this case is before a court of equity and it should be considered in applying that "consideration of fairness" this Court found to have been recommended by the Supreme Court of the United States in *Jackson County v. United States*, 308 U.S. 343, 352, as cited in *Mullaney v. Hess* (189 Fed.2d 417, 420-1).

The Alaska statute on interest is Sec. 25-1-1 A.C.L.A. 1949, which reads:

“Legal Rate Of Interest. The rate of interest in the Territory of Alaska shall be six per cent per annum, and no more, on all moneys after the same become due; on judgments and decrees for the payment of money: . . . on money received to the use of another and retained beyond a reasonable time without the owner’s consent express or implied, or on money due upon the settlement of matured accounts from the day the balance is ascertained.”

The \$509,000 which is now payable to the 2350 claimants, and which became payable on May 12, 1954, is payable on account of a “judgment or decree for the payment of money”. It is true that where an employer has overpaid his contributions to the Unemployment fund, he is entitled to a refund “without interest” (Sec. 51-5-14(f), A.C.L.A. 1949; Sec. 518, Ch. 5, Ex. Session Laws 1955), but there is no prohibition against interest on unpaid and withheld claims for benefits due employees. By allowing no interest to employers under Sec. 51-5-14(f), dealing with refunds, and again imposing 10% interest on employers for delayed payment of contributions under Sec. 51-5-14 A.C.L.A. 1949 and 8% under Sec. 511, Ch. 5, Ex. Session Laws 1955, and remaining silent about interest on overdue benefits to employees, it follows that the Legislature did not intend to deprive claimants of interest.

It seems clear, therefore, that Sec. 25-1-1 A.C.L.A. 1949, is applicable on the matter of interest in this case.

However, the court based its opinion of January 21 (R. 11-18) denying interest, and its judgment of March 19, 1957 (R. 34-36) not on the inapplicability of the statutes above mentioned in other cases, but on the belief that the Territory was the real party defendant and on account of its sovereignty, no interest could be awarded claimants. Even if the Territory could have been considered the real party in interest, so it was in *Mullaney v. Hess* (189 Fed.2d 417, 420-1, *supra*) in which this Court held that in the absence of a statute to the contrary, interest might be recovered on tax refunds.

In that case the Tax Commissioner was the defendant named; in this case it is the Executive Director of the Employment Security Commission. In the *Hess* case we were dealing with refund of taxes to be paid under protest and probable action to recover. In this case we are dealing with Unemployment benefits long past due the claimants. While the amount now fixed at \$509,000 is a little more than that computed at the time of trial in May, 1954, the claims were due at that time. (See pp. 189-90 printed record in Cause No. 14,505.) Surely if interest can be recovered from the Tax Commissioner on a tax refund it ought to be recoverable on these claims for Unemployment benefits.

The Territory, however, is not the defendant, or the real party in interest. The Territory cannot, and could not at any time, have derived any benefit if the action of plaintiff and intervenor had gone against them. Conversely, it loses nothing by the decisions of

the courts against defendant. It can make no difference to the Territory whether the Court now allows interest and attorneys' fees or denies them.

In the case of *Sheldon et al. v. Griffin*, 174 Fed.2d 382, 383, this Court had for consideration an attack on an amendment to the Alaska Unemployment Law, now renamed the Alaska Employment Security Act. The action was brought by Griffin who alleged he was a citizen and taxpayer. This Court, in an opinion by Judges Healy, Mathews and Pope, said:

"In his complaint the plaintiff alleged merely that he was a citizen and taxpayer of Alaska. While he offered no proof on the subject we may assume that he occupies that status. The amendment under attack adds nothing to the burden of taxpayers of Alaska. The Unemployment Compensation fund administered by the Commission is made up of contributions exacted from employers in accordance with regulations prescribed by the Commission, plus fines and penalties collected pursuant to the provisions of the Act. . . ."

If the Territory were a party to this suit it would have been entitled to prosecute its various appeals without a supersedeas bond. Sec. 55-11-6 A.C.L.A. 1949, reads:

"In all actions or proceedings in any court in which the Territory of Alaska is a party, or in which it is interested, it shall not be required to furnish any bond or undertaking upon appeal or otherwise in any such action or proceeding."

However, when application was made by defendant for that purpose, it was denied and the funds sufficient to pay all claims were impounded.

In the case of *New England Fish Co. v. Vaara and Employment Security Commission of Alaska*, 98 Fed. Supp. 492, there was also an application to the court for leave to appeal without supersedeas bond. The trial court denied the application and ordered funds impounded, pending appeal. Then the case was appealed and an application was made to this Court to release the impounded funds, urging the application of Sec. 55-11-6 *supra*, among other grounds. This Court denied the application. (See record in Cause No. 12,872.)

The Territory of Alaska is not concerned, or interested, within the meaning of the statute, in any phase of this litigation.

Section 1001, Ch. 5, Ex. Session Laws 1955, which is substantially the same as Sec. 51-5-19, A.C.L.A. 1949, reads:

“Non Liability Of Territory. Benefits shall be deemed due and payable under this Act only to the extent provided in this Act and to the extent that moneys are available therefor to the credit of the Unemployment fund, and the liability of the Territory and the Commission shall be limited accordingly.”

In other words the payment of contributions is the responsibility of employers, and the receipt of benefits by the unemployed depends on the contributions and nothing else. It is quite different from those cases where the Territory levies a general tax for territorial purposes.

The U.S. Supreme Court has held that under similar circumstances as here, interest should be allowed

(see *Ticonic National Bank v. Sprague*, 303 U.S. 406), although that case did not concern a state or territory. Nor does this case.

(2) ATTORNEYS' FEES.

(A) Fees May Be Allowed Under Salvage Doctrine.

The District Court, in its opinion of January 21, 1957 (R. 11-18) allowed an attorneys' fee of 3% of the amount of the claims to cover the services of the attorneys employed by plaintiff and intervenor, and the expenses of travel, printing briefs, etc. This was under the "salvage" doctrine. In the opinion of March 14 the court, on reconsideration, reversed itself and denied fees and expenses (R. 28-33).

We think the opinion of January 21 was correct as to attorneys' fees and the court there correctly applied the law as declared by the United States Supreme Court in *Sprague v. Ticonic National Bank*, 307 U.S. 161. That case is squarely in point.

Briefly the facts in that case were as follows: Petitioner had sued the Receiver of the Bank to impress on the proceeds of certain bonds a lien for a trust deposit. There were other similar trust deposits but the owners of these were not made parties to the suit and took no part therein. Mrs. Sprague was successful in her suit (303 U.S. 406), and when it was concluded, she then petitioned the District Court for an order allowing her reasonable counsel fees and expenses to be deducted from the share of the proceeds

of the bonds, and which had become payable to them as a result of her litigation.

The District Court held that it was foreclosed from granting petitioner's prayer, because in her litigation to establish her own claim, she had not mentioned any claim for attorneys' fees and expenses, and that the court could do nothing except follow the judgment on the mandate of the Appellate Court (303 U.S. 406). This, of course, had no reference to any trust funds except petitioner's and no reference to attorneys' fees. The U.S. Court of Appeals for the First Circuit (99 Fed.2d 583) affirmed the District Court.

The Supreme Court on certiorari reversed the District Court and the Court of Appeals and held that attorneys' fees and expenses could be recovered from the other beneficiaries even though the suit was not a class action.

We think we have a stronger case here, for this is a class action. No claimant would have received anything but for the efforts and expenditures of plaintiff and intervenor. We asked for costs and attorneys' fees in the complaints (pp. 14-15-17 printed record, Cause 14,505).

It is also interesting to note that in the *Sprague* case the court allowed interest (303 U.S. 405).

In the opinion of March 14 (R. 28-33) and in the final judgment of March 19 (R. 34-36) the District Court felt that its first opinion was wrong and could not be made the basis for a judgment for attorneys' fees to be paid out of claimants' benefits because of

the language of Sec. 763, Ch. 5, Ex. Session Laws 1955; Sec. 51-5-15(c), A.C.L.A. 1949, which reads:

“Sec. 763. *Exemption of Benefits.* Any assignment, pledge, or encumbrance of any rights to benefits which are or may become due and payable under this Act shall be void; and such rights to benefits shall be exempt from levy, execution, attachment, or any other remedy whatsoever provided for the collection of debt; and benefits received, by any individual, so long as they are not mingled with other funds of the recipient, shall be exempt from any remedy whatsoever for the collection of all debts, except debts incurred for necessities furnished to such individual or his spouse or dependents during the time when such individual was unemployed. Any waiver of any exemption provided for in this section shall be void.”

This section is somewhat ambiguous. First it flatly prohibits assignment of claims. Next it prohibits attachment for debts. Then it excepts debts incurred for “necessaries during the time when such individual is unemployed”. A claimant, then, could not assign any claim even in payment of a debt for necessities, but the creditor is free to attach it. This does not seem to make sense.

In order to give this statute any practical effect, must we not interpret it to mean simply that a claim may neither be assigned nor attached, except to pay a debt for necessities?

The word “necessary” has a flexible meaning. The United States District Court, for the Southern Dis-

trict of California, Central Division, in *Walling v. Thompson, et al.*, 65 Fed.Supp. 686, 688, quoting from *Roland Electrical Co. v. Walling*, 146 Fed.2d 745, says that the test of what is necessary is not "indispensibility but actual use".

As in the *Sprague* case, *supra*, there was no assignment of the claims in this case, although the claimants are not resisting payment of attorneys' fees.

Does the work, expense paid, and risk assumed in establishing these claims, which were denied by appellee, establish a *debt* by claimants and intervenor within the meaning of Sec. 763; a debt so sacred and inviolable that not only is an assignment prohibited and an attachment and garnishment enjoined, but a debt which a court of equity is powerless to order extinguished?

Appellants maintain that upon the record here the attorneys' fees and expenditures do not constitute a debt incurred by claimants within the meaning of the first part of Sec. 763; a debt which could neither be assigned, attached nor ordered by a court of equity to be paid.

The legal services and expenditures, if it can be said that they established a debt at all, were surely within the exception, and were debts for "necessaries". They were necessities of the highest order. Until the conclusion of the litigation there were no claims "due", or "to become due" within the meaning of Sec. 763. They would never have "become due" but for the action of plaintiff and intervenor and their attorneys.

The allowance of the 3% does not reduce the amount of any claim. But for this action there would have been no claims.

If the 3% of the claims allowed as attorneys' fees in the court's opinion of January 21 could be considered a debt within the meaning of Sec. 763 as appellee contends, it seems clear that it was a debt for "necessaries". It was first *necessary* to claimants to establish their claims, before they could incur any debt against them for such *necessaries* as food and clothing. We do not think, however, that Sec. 763 has any application in this case.

Appellee says, in effect: "Plaintiff and intervenor could, during the past four years, have furnished claimants half a million dollars worth of food, shelter, clothing, medical service, etc., and their accounts could all have been recognized and paid, either by assignment or attachment, but they cannot recover even the very modest amount of a few thousand dollars necessary to establish the more than half a million dollars in claims." In order to prevail in any such argument, they must reason that the litigation was not necessary. This would seem to be absurd since the appellee has resisted the claims until the highest court in the land has spoken.

(B) Attorneys' Fees May Be Allowed From Commission's Administrative Fund.

Without waiving any part of our argument that attorneys' fees and expenditures may be ordered to be paid out of the fund established by this litigation

under the salvage doctrine as in the case of *Sprague v. Ticonic National Bank, supra*, we insist that, as we respectfully argued to the District Court, these fees may be paid out of the Administrative fund of the Commission. There seems to be clear provision for this in the statutes hereinafter set forth.

The Employment Security funds contributed by employers are divided into two parts; one of which is used to pay benefit claims, and the other to pay costs and expenses of administration. We have been heretofore dealing in Section (A) of this argument, with payment out of the benefits received or to be received by claimants as a result of this action. If, for any reason (and there appears to be none), the fees are not allowed pursuant to the trial court's opinion of January 21 under the salvage doctrine, they may be allowed as a matter of law, under the provisions of Sections 762 and 814, Ch. 5, Ex. Session Laws, Alaska 1955.

These sections read:

“*Section 762. Limitation of Fees.* No individual claiming benefits shall be charged fees of any kind in any proceeding under this Act by the Commission or its representatives, or by any court or any officer thereof. Any individual claiming benefits in any proceeding before the Commission or its representatives or a court may be represented by counsel or other duly authorized agent; but no such counsel or agent shall either charge or receive for such services more than an amount approved by the Commission or the Court. Any person who violates any provision of this section shall, upon conviction thereof, for each

offense, be fined not more than \$500.00, or imprisoned for not more than six months, or both.” (Emphasis supplied.)

“*Section 814. Fees of Attorneys for Claimants on Appeals to Courts.* An attorney at law representing a claimant on appeal to the courts shall be entitled to reasonable counsel fees as fixed by the court not to exceed \$300 and necessary court costs and printing disbursements not exceeding \$150. In difficult cases the court to which the appeal was taken may, upon application of counsel for the claimant, increase such fees, court costs, or disbursements to an amount which the court deem reasonable. Such counsel fees, costs, and disbursements shall be paid by the commission out of employment security administration funds in each of the following cases: (a) any court appeal from an administrative or judicial decision favorable in whole or in part to the claimant, (b) any court appeal by a claimant from a Commission decision which reverses a tribunal decision in his favor, (c) *any court appeal as a result of which the claimant is awarded benefits*, or (d) any court appeal by a claimant from a decision by a tribunal, commission, or court which was not unanimous.” (Emphasis ours.)

In the prayer of the complaint and the complaint in intervention we asked for attorneys' fees and costs without specifying how these should be paid (R. 14, 15, 17, printed record in Cause No. 14,505). We waited until the conclusion of the litigation, and again in our application for proposed judgment reinstating the mandate, we did not specify (R. 9-11). These fees are

to be paid in cases concerned with benefits to claimants.

The lower court passed on the applicability of one of these statutes in the second opinion, that of March 14, 1957, namely, Sec. 762, and held on page 2 of that opinion (R. 29) that fees referred to in that section applied only to appeals of individuals "from the decisions of the Commission", and that the plaintiff "could not be considered as a claimant within the meaning of the statute".

Although we did not ask the Commission before suit was brought to set aside the void regulation, and therefore strictly speaking did not appeal to the court from any decision of the Commission in that respect, it is apparent from the record that the Commission did not consider the Regulation in question to be void and ordered resistance to all claims through four years. They had no intention of paying the claims if Regulation No. 10 was upheld (see testimony of Director Phillips, p. 190 printed record in No. 14,505).

It was surely an appeal from the Commission's decision although brought directly as an injunction suit.

The trial court was right on March 14 in stating that "Fidalgo Island Packing Co. cannot be considered as a claimant". That is true. It did not claim benefits; but what of intervenor and the 2350 claimants on whose behalf both she and the plaintiff sued? They are the claimants.

And what about Sec. 814, Ch. 5, providing for fees or "a claimant on appeal to the courts" in cases,

among others, described in clause (c) of that section as “any court appeal as a result of which the claimant is awarded benefits”?

The trial court did not mention this statute at all. Surely if none of the other statutes hereinabove mentioned, or the salvage doctrine as applied in the opinion of the Supreme Court in the *Sprague* case, *supra*, sanction the allowance of the attorneys’ fees in this case, Sec. 814, Ch. 5, Ex. Session 1955 requires it. The statute says “a claimant on appeal to the courts, *shall be entitled to reasonable counsel fees as fixed by the court. . . .*” This is not a case where we question the discretion of the court as to the amount of the fees, and ask this Court to interfere. The trial court, in its opinion of January 21 said 3% of the total claims was reasonable; but in its opinion of March 14, it concluded, on rehearing, that the court had no power to award anything.

The result therefore is that the trial court in effect followed the opinion of the District Court of Maine in *Sprague v. Picker, Receiver*, 23 Fed.Supp. 59, and not the opinion of the United States Supreme Court reversing it in *Sprague v. Ticonic National Bank etc.* 307 U.S. 161.

(3) APPELLEE HAS NO INTEREST AND IS NOT CONCERNED IN ALLOWANCE OF ATTORNEYS’ FEES UNDER THE SALVAGE DOCTRINE.

The mandate in this case makes it now necessary for appellee and the Commission to pay the claims in full. Whether they pay the whole amount to the

2350 claimants, or part to them and part for necessities furnished them, including necessary services in establishing the claims after long and expensive litigation, would appear to be no concern of theirs. It is a matter between claimants and plaintiff and intervenor. It would seem that the application of the salvage doctrine would be an advantage to appellee, for if that doctrine is not applied, then the statutes, Secs. 762 and 814, Ch. 5, Ex. Session 1955, make it quite clear that attorneys' fees and expenses may be assessed against the administrative fund of the Commission.

(4) PAYMENT OF FEES FROM INTEREST.

If the court should, for any reason, deem it inequitable to allow these fees under the salvage doctrine and that the statutes cited are not applicable, we think it may not be amiss to suggest that they may be allowed as a deduction from the interest which we think is payable to claimants. We think the fees are allowable, either against the claims themselves or under the statutes. This case is before a court of equity, and if here is no way to provide for fees and costs in this type of litigation, the practical effect will be to leave claimants outside the protection of that maxim upon which we have heretofore relied and which teaches us that "equity will not suffer a wrong to be without a remedy".

In such cases no claimant, or group of claimants, to whom employment benefits, could afford to attack the most arbitrary regulation of the Commission depriving them of their rights.

No attorney could afford to undertake the prosecution of a case of this nature, if he could not take assignments in advance, but must speculate on reimbursement of his expenditures and payment of his fees by seeking out the thousands in the class to be benefited, at the conclusion of the litigation, and presenting them with his charges and seeking pro rata payment.

We hesitate to cite to this Court cases which have long since established the principle that equity has jurisdiction of a cause unless the remedy at law is as certain, complete, prompt and efficient as the remedy in equity. The principle is stated by the United States Court of Appeals for the Ninth Circuit in the case of *Lake Charles Rice Mill. Co. v. Pacific Rice Growers' Ass'n.*, 295 Fed. 246 at 249, as follows quoting from *Boyce v. Grundy*, 7 Law. Ed. 655:

“It is not enough, that there is a remedy at law it must be plain and adequate, or, in other words as practical and efficient to the ends of justice and its prompt administration, as the remedy in equity.”

“These cases and the numerous similar decisions in other jurisdictions are applications of the principle that, even where a legal right is invaded equity will grant such relief as is appropriate and necessary, if damages, the only relief possible in an action at law, are wholly inadequate to do justice between the parties. Pomeroy, Equity Jurisprudence (4th Ed.). The trial court did not err in holding that the plaintiffs were entitled to this relief.” *Caramini v. Tegulias*, 112 A.L.R., 12 Conn. 548, 186 A. 482 at 484.

Courts of equity are established and have existed and functioned, as a matter of necessity, from ancient times, under long established rules, for the very purpose of granting relief where it is denied by the law through reason of its universality, inadequacy, or delay.

Pomeroy in discussing the maxim that Equity follows the law says:

“The maxim is, in truth, operative only within a very narrow range; to raise it to the position of a general principle would be a palpable error. Throughout the great mass of its jurisprudence, equity, instead of following the law, either ignores or openly disregards and opposes the law. As was shown in the introductory chapter which deals with the nature of equity, one large division of the equity jurisprudence lies completely outside the law; it is additional to the law; and while it leaves the law concerning the same subject matter in full force and efficacy, its doctrines and rules are constructed without any reference to the corresponding doctrines and rules of the law.”

“Another division of equity jurisprudence is directly opposed to the law which applies to the same subject matter; its doctrines and rules are so contrary to those of the law, that when they are put into operation the analogous legal doctrines and rules are displaced and nullified. As these conclusions cannot be questioned, it is plain that the maxim, Equity follows the law, is very partial and limited in its application, and cannot, like all the other maxims discussed in this chapter, be regarded as a general principle.” Pomeroy’s Equity Jurisprudence, Third Edition, Sec. 427, Fourth Ed. same.

“While the maxim that ‘Equity follows the law’ has been frequently stated and applied, it does not always apply, and does not, of course, apply in those matters which entitle a party to equitable relief, although the strict rule of law is to the contrary.” 30 C.J.S. p. 503.

CONCLUSION.

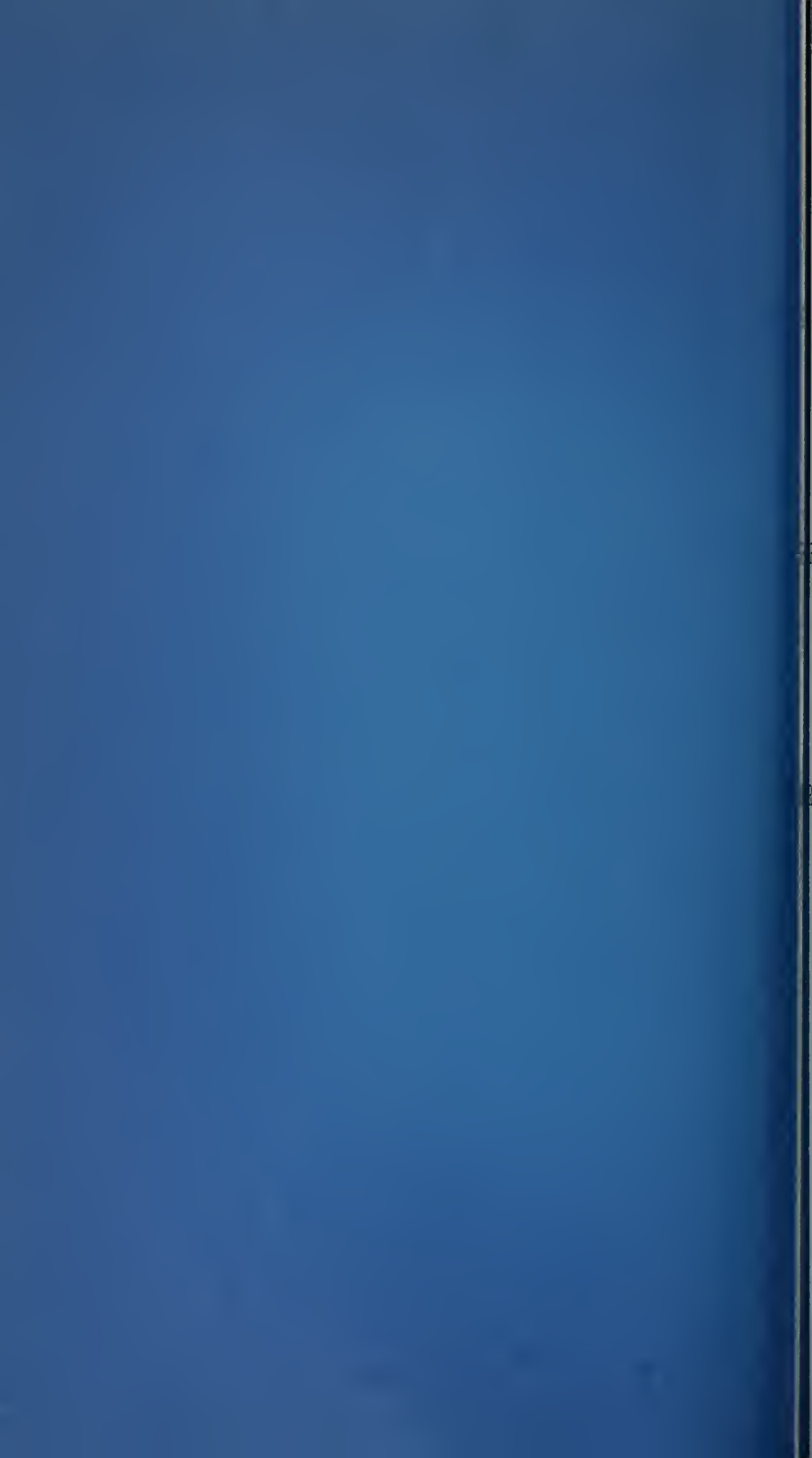
We respectfully request that the judgment on the mandate entered by the District Court on March 19, 1957, be reversed as to disallowance of interest and attorneys’ fees and expenses; and that this case should be remanded with instructions to the trial court to include interest on the claims at 6% per annum from the due dates thereof and an attorneys’ fee to attorneys for plaintiff and intervenor as found to be reasonable, in the trial court’s opinion of January 21, 1957, plus a reasonable fee for services in the proceedings since January 21 in both the District Court and this Court, together with the costs and disbursements of this appeal.

Dated, Juneau, Alaska,
May 6, 1957.

Respectfully submitted,
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(Appendix Follows.)

Appendix.



Appendix

PORTIONS OF FEDERAL RULES APPLICABLE.

Rule 54(d):

“Except when express provision therefor is made, either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs. . . .”

Rule 58:

“ . . . The entry of the judgment shall not be delayed for the taxing of costs.”

PORTIONS OF RULE OF DISTRICT COURT APPLICABLE.

Rule 25:

(1) “Unless the court, in its discretion, otherwise directs, the following schedule of attorneys fees will be adhered to in fixing such fees for the prevailing party *as a part of the costs of the action allowed by law.*”

(2) (Here follows schedule)

(3) “In all other cases where the above schedule shall not be applicable, the court shall fix such fees in favor of the prevailing party as shall appear just and reasonable.”

THE HISTORY OF THE

REIGN OF KING CHARLES THE FIRST

IN THE YEAR 1649

BY JOHN BURNET

LONDON

1688

No. 15,510

IN THE

United States Court of Appeals
For the Ninth Circuit

FIDALGO ISLAND PACKING COMPANY, a Corporation, and CLARA WILSON, Intervenor,
Appellants,

vs.

A. B. PHILLIPS, Executive Director, Employment Security Commission of Alaska,
Appellee.

Appeal from the District Court for the District of Alaska,
Division Number One.

BRIEF FOR APPELLEE.

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FILED

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No. 15,510

United States Court of Appeals

For the Ninth Circuit

FIDALGO ISLAND PACKING COMPANY, a Corporation, and CLARA WILSON, Intervenor,
Appellants,

vs.

A. B. PHILLIPS, Executive Director, Employment Security Commission of Alaska,
Appellee.

Appeal from the District Court for the District of Alaska,
Division Number One.

BRIEF FOR APPELLEE.

JURISDICTION.

This is the second appeal of this case. The previous appeal was taken by the defendant below and is cause number 14,505 in this Court. This appeal was taken by the plaintiff below on April 2, 1957, by filing with the District Court a Notice of Appeal (R. 37). The appeal is taken from the Order of the District Court filed March 19, 1957, reinstating judgment on mandate of this Court. Jurisdiction of the District Court rests upon the Act of June 6, 1900, 31 Stat. 322, as amended; 48 U.S.C.A., Section 101, and the jurisdiction of this Court on Section 1291 of the New Federal Judicial Code.

STATEMENT.

Although a general statement and history of this case are provided the Court in the brief for appellants, the following brief statement is included to clarify the history of the case as the appellee views it. The appellant corporation, a salmon-canning employer, originally filed suit to set aside a seasonality regulation restricting unemployment compensation payments to employees of the canned salmon industry. Appellant corporation's amended Complaint, filed June 29, 1953, sought the injunction of enforcement of seasonality Regulation 10, issued by the Executive Director of the Alaska Employment Security Commission, and such other relief as to the court might seem meet in the premises, including the plaintiffs' costs and disbursements and a reasonable sum as attorney fees (R. 14-15, Cause No. 14,505). The same prayer is contained in the Complaint in Intervention of Clara Wilson, filed November 9, 1953 (R. 17, Cause No. 14,505). The judgment and permanent injunction prayed for were granted by the court below on May 12, 1954, but neither interest nor attorney fees or other costs were granted (R. 65-67, Cause No. 14,505). Appeal from this judgment in Cause No. 14,505 was taken by the appellee on June 11, 1954. No question of the disallowance of attorney fees by the court below or of the failure of the court below to grant interest on claims was raised by the appellant in that original appeal. Judgment was issued on a mandate of this Court on August 13, 1956 (R. 3-7), which affirmed the judgment of the District Court. This judgment, which had been prepared by the appellants

herein, did not provide for interest on claims or for attorney fees or other costs. Execution on that judgment was stayed on September 18, 1956, pending disposal by the United States Supreme Court of the petition for writ of certiorari. After the United States Supreme Court had refused certiorari, the appellants herein presented to the District Court an order reinstating judgment on mandate, but with a new request for the allowance of interest on \$509,000.00 and an attorneys' fee. After hearing and rehearing these issues, the court below issued its order dated March 19, 1957, reinstating the judgment on mandate of this Court and providing for neither interest nor attorney fees. It is from this order that the appellants herein are appealing.

The present named defendant and appellee in this action, A. B. Phillips, was succeeded in his public office by Arthur A. Hedges on April 16, 1955. No substitution of parties defendant has since been made.

QUESTIONS PRESENTED.

Briefly stated, the questions presented are these:

- I. Has the action abated under Rule 25(d) Federal Rules of Civil Procedure?
- II. Have appellants waived the right to assert a claim for interest and attorney fees?
- III. Is payment of interest and attorney fees barred by the sovereign character of the appellee?
- IV. Is payment of interest and attorney fees barred by statute?

SUMMARY OF ARGUMENT.**I.**

Rule 25(d) of the Federal Rules of Civil Procedure provides that when an officer of a Territory is a party to an action and during its pendency dies, resigns, or otherwise ceases to hold office, the action may be continued against his successor in office, but only if his successor is substituted within six months after he assumes office. The present named defendant in this action resigned his public office and was succeeded in that office effective April 16, 1955. No substitution of his successor in office as defendant has been made. Under these conditions we feel that the action should be declared abated.

II.

The Court is not required to review the same case on successive appeals where the demands made in the later appeal were waived by failure to assert them at the proper time. Here, the request for interest was made by the appellants as an afterthought in connection with the entry of an order reinstating a judgment previously entered on the mandate of this Court. It was not sought by its original or amended complaint, nor in the complaint in intervention, nor in connection with entry of the original judgment in this case in May 1954, nor in connection with the first entry of judgment on the mandate of this Court in August 1956. It was only after denial of certiorari by the United States Supreme Court in December 1956 that the unprecedented claim for interest on unemployment benefit amounts was asserted.

Attorney fees were asked in the appellants' original and amended complaint and in the complaint in intervention, but were not granted by the District Court in its judgment entered in May 1954. No assignment of error was made and the question of disallowance of attorney fees was not presented to this Court on the first appeal of the case. Now an appeal is being taken on this question, which was covered, in effect, in this Court's mandate affirming the judgment of the District Court, in which attorney fees were not granted. The question is therefore *res judicata*.

III.

As the District Court recognized, the real party in interest in this action is the Territory of Alaska, acting through an agency clothed with its sovereignty. Although the monies involved are in a special fund, they are tax monies, and the agency administering them is performing a governmental function. A sovereign is not liable for the payment of interest on its obligations, nor for the payment of attorney fees, unless it has consented by statute to the payment of such charges.

IV.

1. *Territorial Law*: The Alaska Employment Security Act forbids payment of monies received as contributions (taxes) under the Act for anything but "benefits" and refunds, as strictly defined. Therefore, no payment can be made from the fund for attorney fees, either directly or through deduction from claim amounts, or for interest.

By Section 1001 of the Act, liability of the Territory in connection with unemployment compensation is limited to the payment of benefits as defined.

Section 763 of the Act forbids any encumbrance whatsoever upon "benefits" so long as they are not mingled with the funds of the recipient. Therefore, no deduction for attorney fees can be made from the claim amounts.

Sections 762 and 814 of the Act provide for payment of attorney fees from the Commission's administrative fund only in cases of judicial review, and subsequent appeals, of administrative determinations of the Commission. Therefore, these sections do not apply to this action for an injunction.

2. *Federal law:* A serious question of conformity of the Alaska law to requirements for Federal tax offset will be raised if anything but unemployment compensation, as strictly defined, is paid from monies that Alaska receives as taxes under its unemployment compensation law (Sec. 3304(a)(4), Internal Revenue Code of 1954 (Title 26, U.S.C.A.)).

Grants for administration are made for such expenses as the Secretary of Labor deems necessary for the "proper and efficient administration" of the Territory's unemployment compensation law (42 U.S.C.A., Section 502(a)). The Alaska law does not provide for attorney fees in this case, and payment of such fees would not be "proper and efficient administration" of the law.

ARGUMENT.

I. THIS ACTION HAS ABATED UNDER RULE 25(d) FEDERAL RULES OF CIVIL PROCEDURE.

At the outset, we ask the Court to determine whether this action has abated under Rule 25(d) of the Federal Rules of Civil Procedure. (Appendix B) We recognize that this Court has a specific rule on abatement of an action where a party has died while an appeal is pending. (Rule 13) Since this rule does not cover the case of a public officer's resignation while an appeal is pending in an action against him, it appears that the Federal Rules of Civil Procedure will apply. (Rule 8, part 1, Rules of this Court.)

An affidavit showing that the defendant, A. B. Phillips, was succeeded in office by Arthur A. Hedges on April 16, 1955, is included as Appendix A. Rule 25(d) F.R.C.P. provides that an action may be continued by or against the successor of a public officer if within six months after the successor takes office it is shown to the Court that there is a substantial need for so continuing and maintaining it. In so providing, Rule 25(d) sets up the one condition upon which such an action may be continued. A cause is "pending" within the meaning of Rule 25(d) even though an appeal is being sought. (*Danenberg v. Cohen*, C. A. 7th, 1954, 213 F. 2d 944. See also *Snyder v. Buck*, 340 U. S. 15.) The District Court rightly recognized this action to be one against a sovereign, the Territory of Alaska, in its opinion filed January 21, 1957. (R. 11-18) Nevertheless, the named individual defendant is an officer of the sovereign and an individual who has

long since resigned his position of authority with that sovereign. This action is one which enjoins that officer from enforcing a regulation. The effect of the injunction is to require certain action of the officer, i.e., payment of certain claims. Although the claims will be paid from Territorial tax monies (contributions) and sovereign immunity from payment of interest and attorney fees would clearly apply to payments from tax monies, nevertheless the named defendant and his successors in office perform a real function in the case. It is they who pay or refuse payment of claims and who enforce or fail to enforce Regulation 10. Under these conditions, the injunction must act against different individuals as the holder of the Director's position changes. That the successor directors of the Commission have each sought to enforce Regulation 10 is shown by the fact that the process of appeal from the injunction against enforcement of this regulation has been continued while each director was in office. Rule 25(d) provides the way in which the action may be continued against the successors in office and this rule provides a strict time limitation within which substitution must be made. Barron and Holtzoff (*Federal Practice and Procedure*, Rules Edition, Vol. 2, pp. 246-255) discuss the decisions under Rule 25(d) at length, pointing out conflicting circuit court decisions on whether an action abates under the rule where a substitution of *plaintiffs* has not been made within six months of the separation from office of a public official who sued in his official capacity. The following is then stated:

“The foregoing discussion of a substitution of public officers in actions brought *by them* in behalf of the government which they represent, is not indicative of any relaxation of the rules on actions *against* the officer. As Judge Sandborn pointed out (*Fleming v. Goodwin*, C. A. 8th, 1948, 165 F. 2d 334, cert. denied, 334 U. S. 828) actions against a public officer abate on his separation from office and survive only if a substitution of his successor is made in strict conformity to the rule. This was also the statutory rule.” (Emphasis supplied.)

The cases under Rule 25(d) are discussed in *Bowles v. Wilke*, 175 F. 2d 35. The following interesting discussion appears at page 39:

“The Government has cited cases as being contrary to this conclusion. Examination of these cases shows that in *United States v. Koike*, 9 Cir., 164 F. 2d 155; *Porter v. Maule*, 5 Cir., 160 F. 2d 1; *United States v. Hirobara*, 9 Cir., 164 F. 2d 157; *Bowles v. Goldman*, D. C. Pa., 7 F.R.D. 12; *Bowles v. Ell-Carr Company, Inc.*, D. C. N. Y., 71 F. Supp. 482; and *United States v. Saunders Petroleum Co., Inc.*, D. C. Mo., 7 F.R.D. 608, the rule was complied with. In *Fleming v. Goodwin*, 8 Cir., 105 F. 2d 334, certiorari denied, 334 U. S. 828, 68 S. Ct. 1338, the Court concluded that non-compliance with the rule did not abate the action. However, it is interesting to note that the Administrator’s successor did file a motion for substitution within the six months period. Hearing on the motion did not occur until after six months had expired. Under these circumstances, it seems apparent that there was no failure to comply with the rule.”

It is noted that "The Advisory Committee in October 1955 recommended to the Supreme Court a revolutionary amendment which, if adopted, will remove all limitations of time for substitution of parties". Unless such an amendment of Rule 25 is adopted, there appears to be no provision for enlargement of time for substitution. Rule 6(b) F. R. C. P. specifically provides that "... the Court ... may not extend the time for taking any action under Rule 25 (and certain other rules) except to the extent and under the conditions stated in them."

It appears to appellee that this action has abated and that the Court should so declare.

II. APPELLANTS HAVE WAIVED THE RIGHT TO ASSERT A CLAIM FOR INTEREST AND ATTORNEY FEES.

Should the Court determine that the action has *not* abated, the next question presented is whether this Court should entertain an appeal to rule upon (1) the allowance of interest on claims, a question which could and should have been presented by the appellants at the outset of the action, and (2) the allowance of attorney fees which were prayed for in the prayer of the appellants' complaints and not allowed by the court below. Neither question was raised as a point of error in appeal proceedings. The questions were not raised until after judgment had once been issued on the mandate of this Court.

"Every existing claim which a party has omitted to make at a hearing on the merits and before final decree is to be considered waived and not

entertained in future proceedings." *The Santa Maria*, 23 U. S. 431.

In this action, not only did the appellants fail to raise the question of interest on claims in the original hearing and in the lengthy appeal through which this case has progressed, but the appellants, in fact, prepared and presented to the Court a judgment on the mandate of this Court which was entered on August 13, 1956, in which no provision for interest or attorney fees was made (R. 3-7). Payment of interest had not been considered in the case until after this final judgment had been entered.

A party generally is estopped, or waives its right to appeal or bring error, where a judgment or decree was entered on its motion. (4 C.J.S., *Appeal and Error*, Sec. 213) It seems inconsistent with the principle of appeal that the appellants, having once procured the entry of judgment without interest or attorney fees, could later reverse their position, ask for interest and attorney fees, and then appeal on the issue when their application for interest and attorney fees was denied. Certainly appellants' silence and presentation of a judgment not providing for interest or attorney fees is inconsistent with their present appeal. Action inconsistent with the appeal generally constitutes an estoppel or waiver. (4 C.J.S., *Appeal and Error*, Sec. 212.)

The allowance of interest on unemployment compensation claims is wholly unprecedented. The claim is one against a sovereign. Under these conditions, the allowance of interest would not be ordinary and in-

cidental to the main action but would be extraordinary. By its mandate in Cause No. 14,505 (R. 4-6), wherein this Court affirmed the judgment of the court below, which provided for payment of claims without interest (R. 65-67, Cause No. 14,505), this Court has in effect acted once on the question of allowance of interest, and the matter is *res judicata* on a second appeal. Similarly, the Court's mandate may be considered to cover the matter of attorney fees, but for a different reason: Attorney fees were denied by the District Court and this Court affirmed the District Court's judgment. The District Court did not err, since that court cannot vary a mandate of the Circuit Court of Appeals or give any further relief. (*Kansas City Southern Railway v. Guardian Trust Company*, 281 U. S. 1.) Likewise, the reviewing court should not be called upon to rule upon a matter which had already been disposed of by its mandate. These matters are the "law of the case".

Appellants base much of their claim for interest and attorney fees upon *Sprague v. Ticonic National Bank*, 307 U. S. 161. Since that action was not against a sovereign, it has little application to this one; however, the cases are distinguishable on various additional grounds: The plaintiff and appellant in that suit, in addition to asking for monies withheld by the bank, had asked originally for interest on these monies and it was allowed. (*Ticonic Bank v. Sprague*, 303 U. S. 406.) Since interest had been sought throughout the action, no question of waiver or estoppel arose on the interest question in the *Sprague*

case. Mrs. Sprague did not assert her right to attorney fees until issuance of judgment on the Circuit Court's mandate. An appeal was allowed on the District Court's denial of appellant's petition for attorney fees. In allowing attorney fees, the court in the *Sprague* case recognized the *Kansas City Southern Railway* case, *supra*, as stating the accepted rule that the District Court cannot vary a mandate of the Circuit Court of Appeals or give any further relief, but the Circuit Court distinguished the *Sprague* case by the fact that the question of attorney fees had not previously been raised in the case, and that therefore, under the particular facts of that case, allowance of attorney fees was not foreclosed by the mandate. This case is altogether different. Here the appellants asked for attorney fees in their amended Complaint and in the Complaint in Intervention. (R. 14-17, Cause No. 14,505). Attorney fees were disallowed (R. 66-67, Cause No. 14,505). The matter was not mentioned again by either party through the lengthy appeal of this case. Judgment on this Court's mandate, as prepared and presented to the court below by the appellants, made no provision for attorney fees. Thereafter, appellants decided to bring up again the request for attorney fees which had been turned down by the District Court in the judgment which went through the whole appeal process to denial of certiorari by the Supreme Court. Since attorney fees have been sought in the District Court and denied, their allowance was necessarily involved in the first appeal. It is accepted that:

“Questions raised on a second appeal which might have been raised and determined in the former appeal are res judicata.” *Clark v. Brown*, 119 F. 130.

“Causes should not be brought up in fragments upon successive appeals.” *Canter v. American Insurance Co.*, 3 Pet. 307.

In the *Canter* case cited above, the U. S. Supreme Court also repeats the general rule which we urge the Court to consider in this case: “No appeal lies in a mere decree respecting costs.”

III. PAYMENT OF INTEREST AND ATTORNEY FEES IS BARRED BECAUSE OF THE SOVEREIGN CHARACTER OF THE APPELLEE.

The trial court recognized that this is an action against a sovereign. The District Court notes that the Commission was performing an essential governmental function and that the Director was acting on legislative mandate in promulgating Regulation No. 10 (R. 16). “The test” (according to *American Jurisprudence on States, Territories and Dependencies*, Section 8) “of whether a particular activity may rightly be called a duty or an obligatory function of government, is whether the welfare of the state as a whole is substantially promoted by or involved in its exercise.” By this test, the Employment Security Commission is clearly an instrumentality of the government acting in its sovereign capacity. Whether the monies involved are in the general or a special fund

is not material. Although the nominal party defendant in this action is the former executive director of the Commission, the real party in interest is the Territory of Alaska, represented by an agency clothed with its sovereignty, the Alaska Employment Security Commission. The relief granted plaintiffs in this case is to enjoin a public official from performing a function relating to the office that he then held. The prayer does not seek to enjoin an individual act of this officer, personal in nature, but rather an act which directly relates to the ordinary duties of his office. The action is in fact against the Territory of Alaska. Because of the sovereign character of the appellee and the absence of statutes authorizing interest or attorney fees, the court below recognized that "no interest can be awarded nor can any costs be allowed." (R. 17.)

The appellants, at pages 13-15 of their brief, state their disagreement with the court below and urge that the Territory in its sovereign capacity is not the defendant in this case nor interested in the litigation. Appellants argue that if the Territory in its sovereign capacity were defendant in this action, funds should not have been set aside or "impounded" pending appeal. We submit that the question of whether the appellee is clothed with sovereign immunity from the payment of interest and attorney fees cannot hinge upon whether the District Court was right or wrong in protecting a fund for the claimants in this action pending appeal.

In pointing out that the liability of the Territory and the Commission is limited to payments provided

for in the Alaska Employment Security Act (Appellants' Brief, p. 15), the appellants are not presenting a reason why the Territory, as a sovereign, is not involved in the case. Rather, the appellants appear to be admitting that no liability for interest or attorney fees exists unless it may be found by statute. As we later point out in this brief, no provision for interest appears in the statutes of the Territory and in fact the payment of interest on benefit claims is prohibited by Territorial and Federal law. The case of *Mullaney v. Hess*, 189 F. 2d 417, can scarcely be considered a precedent for payment of interest in this case. That was an action in which interest was allowed on tax refunds. Such interest is expressly prohibited by the Employment Security Law. (Sec. 51-5-14, ACLA 1949; Sec. 518, Ch. 5, ESLA 1955). Appellants close their argument for interest with a reference to the *Sprague* case, *supra*, in support of their argument. (Appellants' Brief, pp. 15-16) In *Ticonic National Bank v. Sprague*, the court does provide for interest, but refers to *U. S. v. North Carolina*, 136 U. S. 211, 216, for comparison. Obviously, the comparison is to allowance of interest against a private bank and the disallowance of interest against a sovereign under similar circumstances.

The fact that the unemployment trust fund draws interest (albeit at a low rate) does not distinguish this case from the others on sovereign immunity. Of course, monies of a sovereign will draw interest, even if deposited in a private bank. But public policy has dictated the rule that a sovereign shall not pay in-

terest on its obligations, unless by statute it clearly agrees to do so.

As the court below recognized, the general Territorial statute on interest (Sec. 25-1-1, ACLA 1949) does not render the Territory liable for interest. As the District Court says with regard to plaintiffs' application for interest (R. 15):

“... The case of *United States v. North Carolina*, 136 U. S. 211, sets forth the rule that ‘... the State, unless by or pursuant to an explicit statute, is not liable for interest, even on a sum certain which is overdue and unpaid.’ This holding has been widely supported in other jurisdictions: *United States v. Nez Perce County*, Idaho (9th Circ., 1938), 95 F. 2d 238; *Boxwell v. Department of Highways*, 14 So. 2nd 627, 203 La. 760; *State Highway Commission v. Mason*, 6 So. 2nd 468, 192 Miss. 576; *Culver v. Commonwealth*, 35 A. 2nd 64, 348 Pa. 472.”

Application of the rule of sovereign immunity to this case is illustrated by the lack of any precedent for payment of interest on delayed unemployment compensation claims. Surely, were there any precedent for payment of interest on unemployment compensation claims, appellants would cite it. We have searched, and are convinced that such interest payments are unprecedented.

The rule on the application of a general statute on attorney fees to a sovereign is just as explicit. Again quoting the District Court's opinion (R. 16):

“A similar rule has been followed by the courts on the question of costs. In *Ridge v. Boulder*

Creek Union Junior-Senior High School District of Santa Cruz County, 140 P. 2nd 990, 60 Cal. App. 2nd 453, the Court stated:

“General statutes allowing costs to parties have been construed not to apply to the state in the absence of express provision respecting costs where the state was a party.’ See also *Boland v. Cecil*, 150 P. 2nd 819; *Costs*, 14 Am. Jur., 22, Sec. 34; *Territories*, 86 C.J.S. 647, Sec. 38.”

IV. PAYMENT OF INTEREST AND ATTORNEY FEES IS BARRED BY STATUTE.

- (1) Payment of attorney fees or interest would be in conflict with Territorial law.
- (a) Payment cannot be made from the unemployment fund.

The statutes applicable to allowance of interest or attorney fees in this action were presented to the District Court, and their effect was carefully considered by that Court. We therefore urge the most careful consideration by this Court of the District Court’s opinions of January 21, 1957, and March 14, 1957. (R. 11, 28.) The court below, in its second opinion, corrects its first opinion wherein it provided for payment of attorney fees by deduction of the same from unemployment benefits. That court, in its March 14 opinion, recognizes that Section 763, Ch. 5, ESLA 1955, “precludes the impressing of benefits due the claimants with any lien whatsoever” so long as they are not mingled with other funds of the recipient. As the District Court notes, “these funds have not been so mingled and cannot be until they have been

actually paid over to each claimant.” (R. 31) Section 763 reads as follows:

“Exemption of Benefits. Any assignment, pledge, or encumbrance of any rights to benefits which are or may become due or payable under this Act shall be void; and such rights to benefits shall be exempt from levy, execution, attachment, or any other remedy whatsoever provided for the collection of debt; and benefits received by any individual, so long as they are not mingled with other funds of the recipient, shall be exempt from any remedy whatsoever for the collection of all debts except debts incurred for necessities furnished to such individual or his spouse or dependents during the time when such individual was unemployed. Any waiver of any exemption provided for in this section shall be void.”

The statute expressly declares any encumbrance on benefits to be void. However, appellants urge a construction of the statute which would permit an encumbrance for “necessaries”, and then urge that attorney fees are “necessaries” in this case. We submit that a careful reading of Section 763 will show its purpose to be to absolutely prohibit assignment or encumbrance of benefits in order to carry out the purpose of the Act, which is to furnish maintenance during periods of unemployment, not relief for creditors. But legal action is permitted to collect debts incurred for necessities during periods of unemployment, so that a person may, while unemployed and in need, obtain credit on the strength of his unemployment benefits. Counsel fees in this action do not constitute “debts incurred for necessities furnished to

such individual or his spouse or dependents during the time when such individual was unemployed'', and Section 763 makes these debts the only ones for which unemployment benefits may be encumbered. Although the appellants would have the Court look beyond the terms of Section 763, we submit that the Court is limited by the terms of the statute, as set out above. Surely the Court should not extend this provision beyond its terms to permit encumbrance of benefits with counsel fees in a suit brought by a third party primarily for its own benefit to effect a tax saving. (See Complaint, R. 3-15, Cause No. 14,505.)

Section 763, discussed above, specifically prohibits the deduction of such charges as attorney fees from unemployment benefits. The more general provisions of the Employment Security Act also show this prohibition very clearly. Like all state unemployment insurance acts, the Alaska Act requires that all monies received as contributions (employment taxes) be deposited, immediately upon their clearance, with the Secretary of the Treasury of the United States to the credit of the Territory's account in the Unemployment Trust Fund. Sec. 51-5-9(b), ACLA 1949, (now Sec. 402, Ch. 5, ESLA 1955.) Section 51-5-9(c), ACLA 1949 (now Sec. 404, Ch. 5, ESLA 1955, as amended) then provides:

“Withdrawals. In accordance with regulations prescribed by the Commission, moneys shall be requisitioned from the Territory's account in the Unemployment Trust Fund *solely for the payment of benefits and refunds * * **” (Emphasis supplied.)

Thus it will be seen that strict control of monies is imposed by law from the moment of their collection, and that these monies can be used "solely" for the payment of "benefits" and "refunds".

The fund from which the appellants are asking this Court to grant interest and attorney fees is the Unemployment Trust Fund referred to above, and the fund from which no withdrawals can be made excepting for payment of benefits and refunds. In the strict sense of the term, no sum has ever been actually "impounded" in this case; rather, with approval of the District Court, the balance of \$650,000 has always been maintained and is now maintained as an undivided part of the Territory's account in the Unemployment Trust Fund, which is maintained in the United States Treasury. In order to pay the claims involved in this action, withdrawals must be made from the Unemployment Trust Fund in the same manner as for payment of any other benefit claims and the same restrictions will apply.

The provisions of state laws relating to disbursement of monies from the Unemployment Trust Fund must be strictly construed. The pertinent section from *Corpus Juris Secundum* is quoted as follows in its entirety:

"The unemployment compensation fund should be disbursed only in accordance with the strict terms of the statute. Payments out of the Unemployment Trust Fund established by the Federal Social Security Act, 42 U.S.C.A., Sec. 1104, are required to be made on requisition of the State Agency, and withdrawals from the Federal Un-

employment Trust Fund of State funds *may be only for the purpose of paying unemployment benefits.*” 81 C.J.S., Social Security, Sec. 241. (Emphasis supplied.)

In *Illinois v. United States*, 328 U. S. 8, in the following words, the United States Supreme Court recognizes that “State funds must be paid into the United States Treasury, to be credited to a special fund, and can be withdrawn only for paying unemployment benefits.” See also *Howes Brothers Company v. Massachusetts Unemployment Compensation Commission*, 5 N.E. 2d 720, at pages 728-729 (Certiorari denied, 300 U. S. 657.)

State unemployment compensation laws are based upon strict definitions of terms. The principle was clearly recognized by this Court in *New England Fish Co. v. Vaara*, (1951), 98 F. Supp. 492 (affirmed 190 F. 2d 848), a case which turned upon the strict definition of the terms “contributions” and “surplus”. “Benefits” is also a term bearing such an exacting statutory definition. Sec. 51-5-1(b), ACLA 1949 (now Sec. 204, Ch. 5, ESLA 1955), provides that “‘Benefits’ means the money payments payable to an individual, as provided in this Act, with respect to his unemployment”. Sec. 51-5-2(b)(2) (now Sec. 713, Ch. 5, ESLA 1955), provides that “each eligible individual who is ‘unemployed’ in any week shall be paid with respect to such week a benefit in an amount equal to his weekly benefit amount . . .” “Weekly benefit amount” is set at a varying but definite amount by a table which immediately precedes this

section. Thus the Commission is strictly limited in how it may use monies received as contributions (unemployment tax); these monies can be used only to pay "benefits" and to make refunds, and "benefits" means weekly amounts set out in a table which is part of the law. These amounts do not include interest. Neither do they include provision for attorney fees. Appellants point out that the monies in the Unemployment Trust Fund earn a varying low rate of interest (Sec. 1104, Title 42, U.S.C.A., pocket part), and because of this they urge that the interest earned should either (1) be paid to the claimants who benefit from this action (Appellants' Brief, p. 11), or (2) be used as a fund from which attorney fees would be paid (Appellants' Brief, p. 25). Here again, the statutory restriction on payments from the Unemployment Trust Fund applies, since interest on the fund becomes part of it (42 U.S.C.A., Sec. 1104(e)), and cannot be withdrawn except to pay benefits and refunds. Here also, sovereign immunity from payment of interest applies, as we have pointed out in the third section of our brief.

The liability of the appellee under the Alaska Employment Security Act is a liability created by statute, and the statute has definitely limited the extent of liability to payment of "benefits" and refunds. The limitation of liability is made explicit in Sec. 1001, Ch. 5, ESLA 1955, which is substantially a re-enactment of Sec. 51-5-19, ACLA 1949. This section, which is also set out in appellants' brief at page 15, reads:

“Non-Liability of Territory. *Benefits* shall be deemed to be due and payable under this Act *only* to the extent provided *in this Act* and to the extent that moneys are available therefor to the credit of the Unemployment Fund, and the liability of the Territory and the Commission shall be limited accordingly.” (Emphasis supplied.)

We have searched the Act, and can find no authority for payment of either interest or attorney fees.

(b) Payment cannot be made from the administrative fund.

Confusion may arise from appellants' statement at page 21 of their brief on the origin of the administrative fund of the Commission. This fund is made up of monies granted to the Commission by the Federal Government for payment of expenses deemed by the Secretary of Labor to be necessary for the “proper and efficient administration” of the Territory's unemployment compensation law. (Sec. 302 of the Social Security Act) Thus, payments from this fund are controlled by the Secretary of Labor.

The appellants seek attorney fees from the administrative fund based upon two sections of the Alaska Employment Security Act. Section 762 of the Act (Appendix C) limits the amount of fees that may be charged an “individual claiming benefits” to an amount that the Commission or the court approves as reasonable. But as the District Court recognized in its opinion of March 14, 1957 (R. 29), “the Fidalgo Island Packing Company cannot be considered as a claimant within the meaning of the statute, since it

merely sought an injunction forbidding the enforcement of amended Regulation 10." The same is true of the Intervenor, who also merely sought an injunction of enforcement of the regulation, and was not even a seasonal employee. Even if Section 762 would authorize the Court's *approving* an amount which appellant's attorneys could charge the claimants who benefit from this case for attorney fees (and it does not in this case), the section says nothing about charging the *Territory* with these fees or about the Court's *directly charging* the claimants with them as part of its judgment.

Section 814 of the Act (Appendix D) is also cited by the appellant. This section is applicable to judicial review, and subsequent appeals, of administrative determinations of the Commission. In other words, the purpose of this section is to allow attorney fees in certain specified cases where, after administrative procedures have been exhausted, judicial review of the administrative determinations is sought. The section begins, "An attorney at law representing a claimant on appeal to the courts shall be entitled to a reasonable counsel fee . . ." "Such counsel fees" are referred to later in the section, and this serves to modify the reference to specific appeals in which counsel fees will be paid. Thus the reference in Section 814 to appeals from judicial decisions or from a decision of the court is to further appellate review of the decision of the initial reviewing court.

To understand the application of Section 814, it is almost imperative that its position in the Act be

looked to. Section 814 is set forth in Article VIII, which relates to administrative determinations under the Act and the judicial review of such determinations. One can fairly conclude, therefore, that Section 814, which is the last section in this article, was intended to apply to the judicial review of decisions referred to in the immediately preceding sections of the article. As a consequence, this section does not apply to the instant action, which is an action for an injunction. Neither plaintiff nor intervenor sought a review of an administrative decision of the Commission, so neither is a "claimant" within the scope of Section 814. Furthermore, since the intervenor was not in fact a "seasonal" employee, any basis she may have for claiming attorney fees under Section 814 is indeed remote. As statutes allowing attorney fees against a sovereign are statutes in derogation of the common law, they must be strictly construed. (82 C.J.S., *Statutes*, Sec. 393, p. 938; *Ransom v. Williams*, 69 U. S. 313; *Brown v. Berry*, 3 U. S. 365.) Certainly, under this rule, such a statute as Section 814 should not be extended to allow attorney fees in a type of action that it was never intended to cover.

The appellants suggest the application of certain maxims of equity to this case. While these maxims are convenient to quote, they are sometimes contradictory, and are always subject to the principle which the District Court recognizes in its March 14 opinion: "Whenever the rights of the parties are clearly governed by rules of law, courts of equity will follow such legal rules." (R. 32) This principle is set out in

Pomeroy's *Equity Jurisprudence*, Fifth Edition, Sec. 425:

"Courts of equity may no more disregard statutory and constitutional requirements and provisions than can courts of law. They are bound by positive provisions of a statute equally with courts of law . . .

"Whenever the rights of the parties are clearly governed by rules of law, courts of equity will follow such legal rules."

Appellants' attorneys assert that a wrong would be allowed to exist without a remedy if they are unable to deduct a fee from benefit amounts. This is not the case. Any cannery employee whose application for unemployment benefits had been denied could have followed the clearly-defined procedure for appealing through administrative channels to the courts. Had this procedure been followed, presumably attorney fees would have been allowable to the claimant under Section 814. However, that question is not before the Court, since no administrative remedy was sought by any claimant. This is a suit for injunction brought by an employer primarily to avoid payment of increased tax. The intervenor, since not a seasonal employee, could hardly have suffered a "wrong" by enforcement of Regulation 10.

- 2) Payment of attorney fees and interest on claims would raise serious questions of compliance with Federal law and would therefore threaten the continuance of the employment security program in Alaska.

The effect of Federal law is of vital importance in this case. A question is presented as to whether or not,

if attorney fees are deducted from claim amounts, or if interest is paid on the claims, the Alaska unemployment compensation law can be certified by the Secretary of Labor for allowance of the Federal unemployment tax credit and for Federal grants for administration. The relevant Federal requirements are set forth in Section 3304(a)(4) of the Internal Revenue Code of 1954 (Title 26, U.S.C.A.) and 42 U.S.C.A., Sections 503(a)(1) and 503(a)(5).

The Federal Unemployment Tax Act (Int. Rev. Code of 1954, 26 U.S.C.A., Secs. 3301, et seq.) imposes an excise tax of three percent of the first \$3,000 of wages paid by employers of four or more persons. A credit against this tax is allowed to an employer to the extent of contributions paid by him into a State unemployment fund, under an unemployment compensation law of a state certified by the Secretary of Labor under Section 3304(a). Section 3304(a) of the Code directs the Secretary of Labor to approve a state unemployment compensation law if he finds that such law contains certain enumerated provisions. Under Section 3304(c) of the Internal Revenue Code, the Secretary of Labor is required on December 31 of each taxable year to certify to the Secretary of the Treasury each state which he finds has amended its law so that it no longer contains the provisions required by Section 3304(a) of the Code, or has, with respect to such taxable year, failed to comply substantially with such provisions. A finding by the Secretary of Labor that the state has failed to comply substantially with any of such provisions, will result

in a non-certification of the state and a consequent disallowance to the employers within such state of any credit for the three percent Federal unemployment tax.

A certification by the Secretary of Labor is likewise necessary for states to receive grants for administration of their unemployment insurance laws. Under 42 U.S.C.A., Sec. 502(a), the Secretary of Labor is required to certify to the Secretary of the Treasury for payment to each state, such amounts as he considers necessary for the proper and efficient administration of its unemployment compensation law. No certification for Federal grants may be made to any state, however, unless the Secretary of Labor finds that the law of such state contains the provisions enumerated in 42 U.S.C.A., Sec. 503(a). Moreover the Secretary shall not certify any state if he finds that there has been a failure by such state to comply substantially with any of the provisions set forth in 42 U.S.C.A., Sec. 503(a). A finding either that the law of the state, as construed by the court, does not contain the required provisions, or that there has been a substantial failure to comply with any such provision, will result in this Territory's not receiving grants for administration of its employment security program.

Two basic Federal requirements are here involved. Appendix E) The first, as set forth in 42 U.S.C.A., Sec. 503(a)(1), requires the law of the state to include a provision for such methods of administration as are found by the Secretary of Labor to be reason-

ably calculated "to insure *full* payment of unemployment compensation when due." (Emphasis supplied.) The second, which is set forth both in 42 U.S.C.A. Sec. 503(a)(5) and Sec. 3304(a)(4) of the Internal Revenue Code (Title 26, U.S.C.A.), requires in substance that all monies withdraw from the unemployment fund of the state be used, with certain exceptions not pertinent here, in the "payment of unemployment compensation."

Although these required provisions have been substantially adopted in the Alaska Employment Security Act, the question of whether that Act, as construed by the Territorial authorities and the courts, meets the Federal requirements is for the determination of the Secretary of Labor. It is the position of the Bureau of Employment Security of the United States Department of Labor¹ that a construction of the Territorial law permitting the deduction of attorney fees from payments to claimants for unemployment compensation violates both of the above requirements of the Federal law, and that payment of interest on claims would violate the provisions of Section 3304(a)(4) of the Internal Revenue Code.

"Compensation" is defined in Section 3306(h) of the Internal Revenue Code as "*cash benefits payable to individuals with respect to their unemployment*" (Emphasis supplied.) The Alaska law, if construed

¹So stated in memorandum of law received from Regional Attorney for Dept. of Labor, February 18, 1957.

to allow a deduction from benefit amounts for attorney fees, would not provide for methods of administration to insure *full* payment of cash benefits for unemployment. Further, an award for attorney fees is not "cash benefits" payable to claimants for their unemployment, and thus, monies may not be withdrawn from the unemployment fund for this purpose. Likewise, since "cash benefits" are a definite statutory amount without provision for interest, monies may not be withdrawn from the unemployment fund for payment of interest, and if the Alaska law were construed to provide for such a withdrawal for payment of interest, it would provide for withdrawal for a purpose other than for the payment of "unemployment compensation".

Payment of attorney fees and interest is clearly not payment of unemployment compensation, as defined in either the Federal or Territorial statute. Under Section 3304(a)(4) of the Internal Revenue Code of 1954, and under 42 U.S.C.A., Sec. 503(a)(5), monies withdrawn from the unemployment trust fund may be used only for the payment of unemployment compensation. The law as construed by the appellants would not meet such requirements. Accordingly, as we were advised at the time we argued this matter to the District Court, if attorney fees or interest are granted in this case, the Bureau of Employment Security of the United States Department of Labor prepared to recommend to the Secretary of Labor, for his consideration under the procedures provided therefore, the question of whether the Territory of

Alaska, as a result of the order of this Court, has failed to meet the Federal requirements.

One further look at Federal law is important. The administrative fund of the Commission, from which appellants seek attorney fees as an alternative to their allowance under the "salvage" theory, is made up of "such amounts as the Secretary of Labor determines to be necessary for the proper and efficient administration" of the Territory's unemployment compensation law (42 U.S.C.A., Sec. 502(a)). The Bureau of Employment Security has advised us² that it does not deem the payment of attorney fees in this case to be necessary for the "proper and efficient administration" of the Territory's unemployment compensation law.

CONCLUSION.

For the reasons set out in this brief, the appellee submits that neither interest nor attorney fees can be allowed the appellants. Because of the Federal requirements for offset against the Federal Unemployment Tax, the issues are of far-reaching importance to the Territory of Alaska. Allowance of these charges would jeopardize the tax offset and therefore would jeopardize the continuance of the employment security program in Alaska.

The District Court gave the issues of this appeal extremely careful consideration on original hearing

²Telegram from Regional Director, quoting Solicitor's Office received December 27, 1956.

and rehearing. We urge that this Court carefully review the opinions of the District Court filed January 21 and March 14, 1957 (R. 11-18; 28-33). The District Court's ultimate conclusions on these issues are correct.

Dated, Juneau, Alaska,
May 31, 1957.

Respectfully submitted,

J. GERALD WILLIAMS,
Attorney General of Alaska,

DICKERSON REGAN,
Attorneys for Appellee.

(Appendices "A", "B", "C", "D" and "E" Follow.)

Appendices.



APPENDIX "A"

AFFIDAVIT

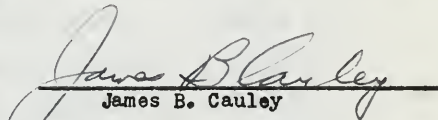
UNITED STATES OF AMERICA)
: ss.
TERRITORY OF ALASKA)

JAMES B. CAULEY, having first been duly sworn on oath depose
and says:

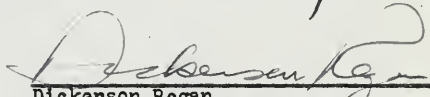
That he is and has been continually for the past several years
the Fiscal and Personnel Officer of the Alaska Employment Security
Commission, and that he has custody of the fiscal and personnel records
of said Commission;

That A. B. Phillips resigned his position as Executive Director
of said Commission and severed all connection with said Commission effective
with the close of business April 15, 1955;

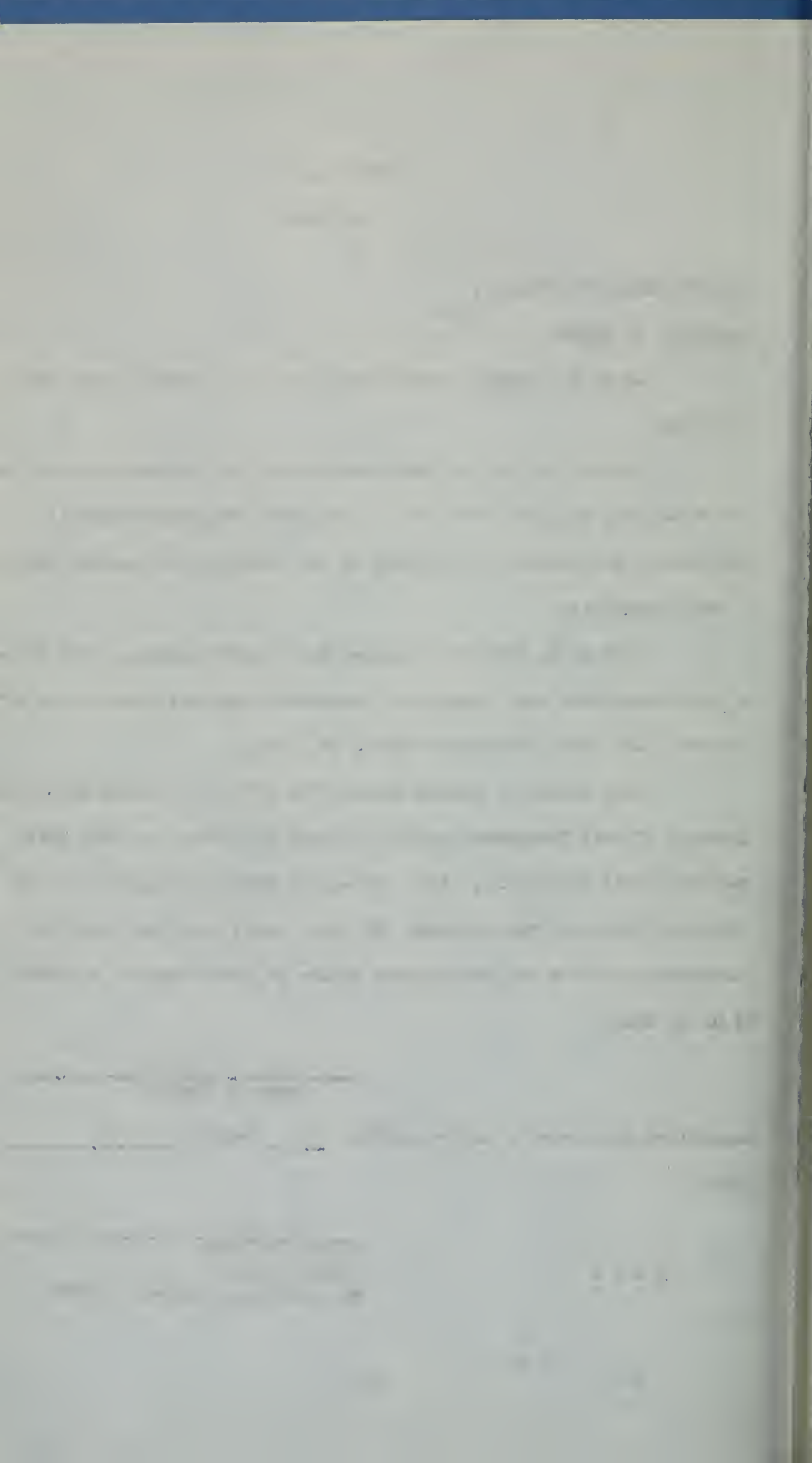
That Arthur A. Hedges assumed the office of Acting Executive
Director of said Commission effective April 16, 1955, and held this
position until January 21, 1956; thereafter Dickerson Regan held the
office of Director from February 23, 1956, until June 18, 1956; his
successor in office and the present holder of the office of Director
is M. E. Weir.


James B. Cauley

Subscribed and sworn to before me this 31 day of May,
1957.


Dickerson Regan
Notary Public for Alaska
My commission expires 9/16/57

(S E A L)



Appendix "B"

FEDERAL RULES OF CIVIL PROCEDURE, RULE 25 (d).

"Public Officers: Death or Separation from office.

When an officer of the United States, or of the District of Columbia, the Canal Zone, a territory, an insular possession, a state, county, city, or other governmental agency, is a party to an action and during its pendency dies, resigns, or otherwise ceases to hold office, the action may be continued and maintained by or against his successor, if within 6 months after the successor takes office it is satisfactorily shown to the court that there is a substantial need for so continuing and maintaining it. Substitution pursuant to this rule may be made when it is shown by supplemental pleading that the successor of an officer adopts or continues or threatens to adopt or continue the action of his predecessor in enforcing a law averred to be in violation of the Constitution of the United States. Before a substitution is made, the party or officer to be affected, unless expressly assenting thereto, shall be given reasonable notice of the application therefor and accorded an opportunity to object. As amended Dec. 29, 1948, Eff. Oct. 20, 1949.

Appendix "C"

SECTION 762, CHAPTER 5, EXTRAORDINARY SESSION LAWS OF ALASKA.

Limitation of Fees: No individual claiming benefit shall be charged fees of any kind in any proceeding under this Act by the Commission or its representatives, or by any court or any officer thereof. Any individual claiming benefits in any proceeding before the Commission or its representatives or a court may be represented by counsel or other duly authorized agent; but no such counsel or agent shall either charge or receive for such services more than an amount approved by the Commission or the Court. Any person who violates any provision of this section shall, upon conviction thereof, for each offense, be fined not more than \$500.00, or imprisoned for not more than six months, or both.

Appendix "D"

SECTION 814, CHAPTER 5, EXTRAORDINARY SESSION LAWS OF ALASKA.

Fees of Attorneys for Claimants on Appeals to Courts. An attorney at law representing a claimant on appeal to the courts shall be entitled to reasonable counsel fees as fixed by the court not to exceed \$300 and necessary court costs and printing disbursements not exceeding \$150. In difficult cases the court to which the appeal was taken may, upon application of counsel for the claimant, increase such fees, court costs, or disbursements to an amount which the court seems reasonable. Such counsel fees, costs, and disbursements shall be paid by the commission out of employment security administration funds in each of the following cases: (a) any court appeal from an administrative or judicial decision favorable in whole or in part to the claimant, (b) any court appeal by a claimant from a commission decision which reverses a tribunal decision in his favor, (c) any court appeal as a result of which the claimant is awarded benefits, or (d) any court appeal by a claimant from a decision by a tribunal, commission, or court which was not unanimous.

Appendix "E"

The two requirements are as follows:

Social Security Act, Sec. 303 (a) (42 USCA, Sec. 503 (a)): "The Secretary of Labor shall make no certification for payment to any State unless he finds that the law of such State, approved by him under the Federal Unemployment Tax Act, includes provision for—

(1) Such methods of administration (including after January 1, 1940, methods relating to the establishment and maintenance of personal standards on a merit basis, except that the Secretary of Labor shall exercise no authority with respect to the selection, tenure of office, and compensation of any individual employed in accordance with such methods) as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due; and

(5) Expenditure of all money withdrawn from an unemployment fund of such State, in the payment of unemployment compensation, exclusive of expenses of administration, and for refunds of sums erroneously paid into such fund and refunds paid in accordance with the provisions of section 1606(b): *Provided*, That an amount equal to the amount of employee payments into the unemployment fund of a State may be used in the payment of cash benefits to individuals with respect to the disability, exclusive of expenses of administration

i

tion: *Provided further*, That the amounts specified by section 1103(c)(2) of this title may, subject to the conditions prescribed in such section, be used for expenses incurred by the State for administration of its unemployment compensation law and public employment offices; * * *."

Internal Revenue Code, Sec. 3304 (a) (4) (Title 26, SCA): " * * * all money withdrawn from the unemployment fund of the state shall be used solely in the payment of unemployment compensation, exclusive of expenses of administration, and for refunds of sums erroneously paid into such fund and refunds paid in accordance with the provisions of section 305 (b); except that—

(A) an amount equal to the amount of employment payments into the unemployment fund of a State may be used in the payment of cash benefits to individuals with respect to their disability, exclusive of expenses of administration; and

(B) the amounts specified by section 903 (c) (2) of the Social Security Act may, subject to the conditions prescribed in such section, be used for expenses incurred by the State for administration of its unemployment compensation law and public employment offices; * * *."

No. 15,510

IN THE

United States Court of Appeals
For the Ninth Circuit

FIDALGO ISLAND PACKING COMPANY, a Corporation, and CLARA WILSON, Intervenor,
Appellants,

VS.

A. B. PHILLIPS, Executive Director, Employment Security Commission of Alaska,
Appellee.

Appeal from the District Court for the District of Alaska,
Division Number One.

REPLY BRIEF OF APPELLANTS.

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P. O. Box 1121, Juneau, Alaska,
Attorneys for Appellants.

FILED

JUN 19 1957

PAUL P. O'BRIEN, CLERK



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Appellee.

Appeal from the District Court for the District of Alaska,
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REPLY BRIEF OF APPELLANTS.

I.

SUBSTITUTION OF PARTY DEFENDANT.

This is not properly before this Court. There was no cross appeal. It is foreclosed by the mandate. The question was raised for the first time in the District Court on the rehearing on the application for reinstatement of the judgment on the mandate with modifications. The only references to it in the record are

defendant's motion of February 28, 1957 (R. 27) and the court's order of denial (R. 32-3).

Furthermore, the judgment and decree in this case are binding on A. B. Phillips, "*present Director of the Employment Security Commission of Alaska, and his agents, officers, employees, and his and their successors in office*" (R. 66, Case No. 14505; emphasis ours) and Rule 65(d) F.R.C.P. makes the injunction binding, not only on the parties to the suit, but upon "their officers, agents, servants, employees and attorneys and those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise."

The Commission and whoever may have been the executive director from time to time have recognized this by continuing the litigation by their appeals and contesting every step.

The action is not a personal one, but was brought against, one, McLaughlin as "Executive Director, Employment Security Commission of Alaska." It did not abate every time the name and person of that director changed for the judgment is binding on all. (See Rule 65(d), F.R.C.P. and R. p. 66, Cause No. 14505.)

The real party defendant has always been the same. As was said in the decision of the U.S. Court of Appeals for the 8th Circuit, in *Fleming v. Goodwin* (165 Fed. 2d 334, at 338):

"To hold that the action abated upon the resignation of Chester Bowles as Price Administrator and was no longer maintainable because of the noncompliance by his successor with Rule 25(d)

would, in our opinion, be to glorify form over substance.”

II.

ORIGINAL JUDGMENT ON MANDATE OF AUGUST 13, 1956.

The fact that the original judgment on the mandate of August 13, 1956, makes no mention of interest or attorneys' fees is immaterial. Appellee's contention that this foreclosed the plaintiff and intervenor runs counter to the two decisions of the U.S. Supreme Court in *Ticonic National Bank v. Sprague* (303 U.S. 406), and *Sprague v. Ticonic National Bank*, 307 U.S. 161.

When this Court's mandate was entered on July 3, 1956, the District Court bench was vacant at Juneau. After the mandate was received, the attorney for appellee stated that he did not intend to apply for certiorari but requested that no judgment be entered until his associate should arrive in Juneau from the east. When he arrived he announced that he would apply for certiorari. Appellants felt that the matter of attorneys' fees could be better determined following the final disposition of the case as was done in the *Sprague* case. Aside from that, however, Rule 60(b)-6 sanctions the procedure we followed. We quote from *Sprague v. Ticonic National Bank*, 307 U.S. 161 at 68:

“Certainly the claim for ‘as between solicitor and client’ costs was not directly in issue in the original proceedings by *Sprague*. It was neither before

the Circuit Court of Appeals nor before this court. Its disposition, therefore, by the mandate of either court could be implied only if a claim for such costs was necessarily implied in the claim in the original suit, and its failure to ask for such costs an implied waiver. *These implications are repelled by the basis on which such costs are granted.* They are not of a routine character like ordinary taxable costs; they are contingent upon the exigencies of equitable litigation, *the final disposition of which in its entire process including appeal, place such a claim in much better perspective than it would have at an earlier stage.*" (Emphasis supplied.)

And again at page 168:

"While a mandate is controlling as to matters within its compass, on the remand a lower Court is free as to other issues. . . ."

At page 169:

"The whole proceeding is a collateral one having a distinct and independent character."

Therefore we feel that appellants here were free to await the final disposition of this case by the Supreme Court and then to ask for interest and attorneys' fees in the same suit either under Rule 60(b) or on the authority of the *Sprague* cases.

It is true as appellee says that we did not ask for interest in the original suit. We did ask for costs and attorneys' fees, but did not specify there that we claimed attorneys' fees and expenses "as between solicitor and client." The trial Court did not, at the time

the decree was entered on May 12, as counsel says, deny costs and attorneys' fees. The Court at that time did not have the matter before it. No cost bill was filed. Our total taxable costs at that time were only \$15.00, and we could not estimate an attorney's fee, or the amount of expense that would be involved, until the conclusion of the litigation. There was never any waiver in the whole proceedings.

It does not appear in the first case of *Ticonic National Bank v. Sprague* (303 U.S. 406) whether plaintiff had asked for interest in her complaint. It does not appear in the decisions of the lower Courts in that case, namely, 14 Fed. Supp. 900 and 87 Fed. 2d 365 and 90 Fed. 2d 641. Whether she did or did not would not seem to us to prevent its allowance by a court of equity.

Furthermore, as pointed out in our opening brief at page 11, the Commission received interest on the impounded funds, and those funds to the amount of \$509,000 belonged to claimants. It would seem that a Federal Court of Equity would have the same power, on the final disposition of the case, to allow interest, as it had to allow attorneys' fees.

III.

APPLICABILITY OF SEC. 763, CH. 5, EX. SESSION LAWS, 1955.

Counsel for appellee in Sec. IV-1-a of their brief stress the language of Sec. 763, Ch. 5 Ex. Session Laws, 1955, and contend in effect that its provisions

forbid the application of the "salvage doctrine" in this case. In addition to what we have said in our opening brief, we respectfully submit the following:

Even if Sec. 763 does prohibit assignment of claims for debts, and the allowance of attorneys' fees and expenses under the salvage doctrine is considered assignment of a debt and within the prohibition, that would not affect the power of a Court of Equity to allow the fee as between attorney and client, or plaintiff and claimants; and the statute, so far as it may attempt any such interference, is void.

As argued in our opening brief, we do not think Sec. 763 is susceptible to appellee's interpretation; but for the sake of argument, let us assume it is, then it is in contravention of that provision of Sec. 3 of the Alaska Organic Act (ACLA 1949, 37 Stat. 512), which reads:

"And the legislature shall pass no law depriving the judges and officers of the district court of any authority, jurisdiction or function exercised by like judges or officers of district courts of the United States."

The Supreme Court of the United States held in *U.S. v. Wigger* (235 U.S. 276, 59 Law. Ed. 226) that laws affecting the jurisdiction of the Courts of Alaska come within the category of laws which can be amended or repealed only by Congress and not by the legislature of Alaska.

Equity suits in Federal Courts are regulated exclusively by Federal law and decisions and are not affected by State statutes.

It was held by the Supreme Court in *U.S. ex rel. Louisiana v. Boarman* (244 U.S. 397, at 403):

“This claim cannot be seriously entertained in the face of the long time perfectly settled law that equity suits in Federal Court and the Appellate procedure in them are regulated exclusively by Federal Statutes and decisions, unaffected by statutes of the States. Textbook citations will suffice: Street Fed. Eq. Pro. Secs. 97 and 98; Simkins Fed. Eq. Suit. Ch. 1.”

And again in *Pusey, Jones Co. v. Hanssen* (261 U.S. 491 at 497):

“That a remedial right to proceed in a Federal Court sitting in equity cannot be enlarged by State Statute is likewise clear. (Citing cases.) Nor can it be so narrowed.”

We find the following in *Guffy v. Smith* (237 U.S. 1, 114):

“By the legislation of Congress and repeated decisions of this court it has long been settled that the remedies afforded and modes of proceeding pursued in the Federal Courts, sitting as courts of equity, are not determined by local laws or rules of decision, but by general principles, rules and usages of equity having uniform operation on those courts wherever sitting. (Citing cases.) As was said in the first of these cases: ‘Wherever a case in equity may arise and be determined under the judicial power of the United States, the same principles of equity must be applied to it, and it is for the Courts of the United States, and for this Court, in the last resort, to decide what those principles are, and to apply such of them to each

particular case, as they may find justly applicable.' ”

IV.

CONCLUSION.

In the concluding pages of their brief, counsel argue in effect that if attorneys' fees are allowed to be paid as ordered by Judge Kelly in his opinion of January 21, 1957, and deducted from the claims of the beneficiaries of this litigation, the Secretary of Labor may not agree with the Court and therefore may declare the Alaska Act to be out of conformity with the Federal Act. Such an argument was made before Judge Kelly on the petition for rehearing.

This argument seems to us to be entirely out of place in any Court. Aside from that, the argument is absurd. One can hardly imagine the Secretary setting himself up as a court of last resort and assuming to hold a whip hand over the District Court and this Court.

If there is anything wrong with the statute of Alaska, that is for the consideration of the legislature.

Dated, June 19, 1957.

Respectfully submitted,

FAULKNER, BANFIELD & BOOCHEVER,

JOHN H. DIMOND,

H. L. FAULKNER,

By H. L. FAULKNER,

Attorneys for Appellants.



No. 15515

United States
Court of Appeals
for the Ninth Circuit

RALPH B. DEFENBACH, as Trustee,
Appellant,

vs.

R. MAX ETTER and PAUL C. KEETON,
Appellees.

Transcript of Record

Appeal from the United States District Court for the Eastern
District of Washington, Northern Division

FILED

JUN 17 1957

PAUL P. O'BRIEN, CLERK



No. 15515

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RALPH B. DEFENBACH, as Trustee,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Spokane, Washington,

Attorney for Defendant-Appellant.

In the United States District Court, Eastern District of Washington, Northern Division

Civil Action No. 1308

THE MACCABEES, a fraternal benefit society,
Plaintiff,

vs.

MARY P. WEYEN, individually, and as guardian of Daryl Weyen and Carolyn Weyen, Minors; RALPH B. DEFENBACH as Trustee; E. J. STANFILL as Trustee and E. J. STANFILL as Executor of the Estate of Robert Francis Weyen, Deceased, Defendants.

STIPULATION

The parties defendant in this cause, being represented by respective counsel, R. Max Etter and S. Dean Arnold, do hereby stipulate as follows:

Whereas, there has heretofore been filed in this cause a Motion for Summary Judgment by defendant, Ralph B. Defenbach, based upon the opinion of the United States District Court in the case of Sun Life Assurance Company v. Weyen, et al., No. 1309 of the records of the Clerk of the United States District Court; and

Whereas, it appears that the case of Sun Life Assurance Company v. Weyen, heretofore mentioned, is now on appeal and is being appealed to the Court of Appeals for the Ninth Circuit; and

Whereas, it appears that the disposition of said appeal by the Court of Appeals for the Ninth Cir-

cuit will be dispositive of the issues in the present cause;

It is, therefore, hereby stipulated between R. Max Etter and S. Dean Arnold, as follows:

I.

Plaintiff, The Maccabees, in the above-entitled cause, shall be under no further obligation to participate in said matter [1]* and cause, and counsel for said The Maccabees, to-wit, Graves, Kizer, Greenough & Gaiser, shall be entitled to attorneys' fees and costs in the sum of \$265.78 to be disbursed by the Clerk of the Court.

II.

The decision or order of the Court on defendant Defenbach's Motion for Summary Judgment shall be withheld pending decision by the Court of Appeals for the Ninth Circuit, in the case of *Sur Life Assurance Company v. Weyen*, after which the Court shall rule on said Motion for Summary Judgment, and the disposition of funds involved in the instant cause.

III.

Honorable Stanley D. Taylor, Clerk of the United States District Court, in his personal capacity, and acting for all of the parties, may receive from the Clerk of the Court, the sum of \$5,731.49, being the total amount deposited in this said action by plaintiff, and the said Stanley D. Taylor shall be authorized, and is so authorized by this stipulation

* Page numbers appearing at foot of page of original Transcript of Record.

to deposit the same with the Fidelity Savings & Loan Association of Spokane, Washington, until such time that said money may be disbursed upon order of this Court.

Dated this 16th day of April, 1956.

/s/ R. MAX ETTER,

/s/ PAUL C. KEETON,

Attorneys for Ralph B. Defenbach.

/s/ S. DEAN ARNOLD.

Approved May 2, 1956.

/s/ SAM M. DRIVER,

United States District Judge. [2]

[Endorsed]: Filed April 27, 1956.

[Title of District Court and Cause No. 1308.]

ORDER

It appearing that defendants in the above entitled cause have entered into a stipulation in respect to disposition of the above entitled cause, it is

Ordered that the Clerk of this Court disburse and pay to counsel for plaintiff, Graves, Kizer, Greenough & Gaiser, the sum of \$265.78, as and for reasonable fee and costs of plaintiff in the above entitled action, and said amount shall be withdrawn from funds deposited in this cause by said plaintiff, and the Clerk is authorized to draw a check in favor of said counsel, and counsel are further dismissed and excused from any participation in said cause;

And It Is Further Ordered that the stipulation on file be approved in accord with its terms.

Dated this 2nd day of May, 1956.

/s/ SAM M. DRIVER,
Judge of the U. S. District Court.

Approved:

/s/ S. DEAN ARNOLD.

/s/ R. MAX ETTER. [3]

[Endorsed]: Filed May 2, 1956.

In the United States District Court, Eastern District of Washington, Northern Division

Civil No. 1309

SUN LIFE ASSURANCE COMPANY OF CAN-
ADA, a corporation, Plaintiff,

vs.

MARY P. WEYEN, individually and as guardian of Daryl Weyen and Carolyn Weyen, minors, ELFRIEDA MAY, RALPH D. DEFENBACH, as Trustee, E. J. STANFILL, as Trustee and E. J. STANFILL, as Executor of the Estate of Robert Francis Weyen, Deceased, Defendants.

NOTICE OF LIEN AS TO ABOVE NUMBERED ACTION and CIVIL No. 1308

To Ralph B. Defenbach, as Trustee:

You Are Hereby Notified that the undersigned have and claim a lien upon that certain Judgment

and check in payment of said Judgment, and now in the possession of R. Max Etter, attorney at law, Spokane, Washington, which is in the total of \$60,302.94, in the amount of \$16,500.00 for attorneys' fees and costs of action and personal expenses in the above entitled action, and in a companion action entitled: "The Maccabees, a fraternal benefit society, Plaintiff, vs. Mary P. Weyen, et al., Defendants, bearing Civil No. 1308.

The legal services were rendered on your behalf on and in the above entitled cause and said companion action No. 1308 during the period from May, 1955, to June 7th, 1956.

Dated at Spokane, Washington, this 20th day of June, 1956.

/s/ R. MAX ETTER.

/s/ PAUL C. KEETON. [4]

[Endorsed]: Filed June 20, 1956.

[Title of District Court and Cause No. 1309.]

NOTICE OF LIEN AS TO ABOVE NUMBERED ACTION and CIVIL No. 1308

To Ralph B. Defenbach, as Trustee:

You Are Hereby Notified that the undersigned have and claim a lien upon that certain Judgment and check in payment of said Judgment, and now in the possession of R. Max Etter, attorney at law, Spokane, Washington, which is in the total of \$60,302.94, in the amount of \$16,500.00 for attorneys' fees and costs of action and personal expenses

in the above entitled action, and in a companion action entitled: "The Maccabees, a fraternal benefit society, Plaintiff, vs. Mary P. Weyen, et al., Defendants, bearing Civil No. 1308.

The legal services were rendered on your behalf on and in the above entitled cause and said companion action No. 1308 during the period from May, 1955, to June 7th, 1956.

Dated at Spokane, Washington, this 20th day of June, 1956.

/s/ R. MAX ETTER.

/s/ PAUL C. KEETON. [5]

[Endorsed]: Filed June 20, 1956.

[Title of District Court and Cause No. 1309.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause coming on duly and regularly for trial on Tuesday, the 18th day of October, 1955, at 10 o'clock a.m., in the court rooms of the above entitled court at Spokane, Washington, before the Honorable Sam M. Driver, judge of the above entitled court, the plaintiff was represented by the law firm of Graves, Kizer, Greenough & Gaiser of Spokane, Washington; and the defendant Mary P. Weyen, individually and as guardian of Daryl Weyen and Carolyn Weyen, minors, was represented by S. Dean Arnold of Clarkston, Washington; the defendant Elfrieda May was represented by C. C. Rowan of Spokane, Washington

the defendant Ralph B. Defenbach as trustee was represented by Paul C. Keeton of Lewiston, Idaho, and R. Max Etter of Spokane, Washington; and the defendant E. J. Stanfill as trustee and E. J. Stanfill as executor of the estate of Robert Francis Weyen, deceased, was represented by S. Dean Arnold of Clarkston, Washington. All of the attorneys for the respective parties were present in court; and Elfrieda May, Ralph B. Defenbach [6] and E. J. Stanfill appeared personally.

All parties having announced their readiness to proceed with the trial, the Court heard testimony of witnesses called by both the plaintiff and the defendants and examined documentary evidence presented by the parties, and having heard oral arguments by the attorneys for the defendants at the conclusion of the trial and they having been allowed sufficient time for the submission of briefs by all parties, and the Court having been fully advised in the premises now makes it

Findings of Fact

The Court finds:

I.

That this Court has jurisdiction of said cause and all of the parties thereto on account of Sec. 2361 of the United States Code which provides for interpleading causes of action, one of which is cases involving life insurance policies as in the case at bar; that in accordance with the interpleader statute, the plaintiff Sun Life Assurance Company of Canada, a corporation, has deposited in the regis-

try of the court the net proceeds of eight life insurance policies on the life of Robert F. Weyen who died accidentally on April 16, 1955; the defendants, being rival claimants to the proceeds of the policies, they have been impleaded as defendants.

II.

That the policies interpleaded in this action by the Sun Life Assurance Company of Canada, a corporation, plaintiff, are as follows: No. 1 447 698; No. 1 852 251; No. 1 952 847; No. 1 710 519; No. 1 919 863; No. 1 755 413; No. 1 861 701 and No. 1 861 700. [7]

III.

That on September 22, 1953, Robert F. Weyen was a resident of Asotin County, state of Washington, and secured a decree of divorce in the Superior Court of that county from his wife, Mary P. Weyen; that Mary P. Weyen was awarded custody of the two minor children of the parties namely, Daryl Weyen and Carolyn Weyen. That as a part of the divorce proceedings, Robert F. Weyen was required to pay Two Hundred (\$200.00) Dollars per month for the support of said minor children during their minority; and the insurance policies in suit, in accordance with the Property Settlement Agreement entered into between the parties, were awarded to the insured, Robert F. Weyen.

IV.

That on September 23, 1953, Robert F. Weyen executed a trust agreement, or declaration of trust

n which he named his attorney, the defendant E. F. Stanfill, as trustee, and stated that he had designated the trustee as beneficiary of ten life insurance policies, seven of which policies are involved in the present action, three being issued by insurance companies other than the plaintiff. The policies constituted the corpus of the trust. The trust was to continue for a period of fifteen years and the beneficiaries were the two minor children of Robert F. Weyen. The trust agreement provided that in case of the death of Robert F. Weyen during the trust period, the trustee should collect the proceeds of the life insurance policies and use them for the education, maintenance and support of the minor children. The trust agreement contained the following provision:

“The donor specifically reserves the right, during the term of this trust, to pledge any of such policies as collateral or to exercise the loan rights as provided in said policies, and in the event the donor makes application for such loans, it is hereby expressly understood that the signature of the trustee herein named shall not be required to join in the application for said loans.” [8]

V.

That on September 23, 1953, Robert F. Weyen executed a Last Will and Testament, in which he stated that he had made no provision for his minor children because, “I have heretofore provided for them through insurance policies on my life; however, should said policies lapse or become null and

void, I hereby give, and devise and bequeath to my said children the sum of \$10,000.00, share and share alike.”

VI.

That prior to November 16, 1954, Robert F. Weyen had become involved in financial difficulties and was unable to pay his debts; and that on November 16, 1954, he executed an assignment to Ralph B. Defenbach as trustee for the benefit of his creditors. In that document he assigned all his property, assets and income to Ralph B. Defenbach as trustee for his creditors. Certain real property and a number of items of personal property were particularly described in the assignment and said assignment included all *by* one of the life insurance policies which are the subject of the present action. The policies assigned to Ralph B. Defenbach as trustee are as follows:

1 852 251	Sun Life Assurance Co. of Canada	\$ 2,00
1 952 847	Sun Life Assurance Co. of Canada	5,00
1 710 519	Sun Life Assurance Co. of Canada	1,00
1 919 863	Sun Life Assurance Co. of Canada	3,00
1 755 413	Sun Life Assurance Co. of Canada	1,00
1 861 701	Sun Life Assurance Co. of Canada	10,00
1 861 700	Sun Life Assurance Co. of Canada	10,00

Pursuant to the assignment to the defendant Defenbach, the necessary documents were prepared and the assignor delivered the policies to Defenbach for forwarding to the home offices of the companies issuing said policies so that appropriate endorsements might be attached thereto showing Defenbach as beneficiary thereunder. In this manner said

policies were [9] pledged to defendant Ralph B. Defenbach as trustee for the creditors of Robert F. Weyen.

VII.

By its terms the Stanfill Trust specifically reserved a right to the donor, Robert F. Weyen, to exercise the loan rights as provided in the policies of insurance and "to pledge any of such policies as collateral"; that this trust agreement was drafted by a lawyer and the right to pledge as collateral reserved to the donor a means of putting up the policies as security for a debt additional to the personal obligation of the debtor. The right reserved to pledge the insurance policies as collateral applied to security for the payment of debts, whether they be antecedent or newly created.

VIII.

When Robert F. Weyen got into serious financial difficulties in November of 1954, he took advantage of the reservation he had made in his declaration of trust and did pledge the life insurance policies as collateral security for the payment of his debts. It was not necessary for him to change the beneficiary in order to accomplish that purpose; that in executing the Assignment to Trustee for Benefit of Creditors dated November 16, 1954, Robert F. Weyen intended to pledge his assets including his life insurance as security for the payment of his debts.

IX.

That the Court finds that prior to the time of

the execution of the Assignment to Trustee for Benefit of Creditors on November 16, 1954, Robert F. Weyen had assigned to the defendant Elfrieda May policy No. 1 447 698, to which policy no claim is made by the defendant Defenbach; [10] that during the trial of said cause, the defendant Elfrieda May did not contest the right of the minor children Daryl Weyen and Carolyn Weyen to the proceeds of said policy; that there is no evidence in the record that said policy was assigned to Elfrieda May for security for any indebtedness owed to her by the deceased; that the net proceeds of said policy should be awarded to E. J. Stanfill as trustee for Daryl Weyen and Carolyn Weyen.

X.

That the courts as a general rule have recognized the right of a plaintiff in interpleader actions to recover from the funds deposited in the registry of the court their costs and a reasonable attorney fee. The Court finds that in addition to their costs, the plaintiffs are entitled to a reasonable attorney fee in the amount of two percent of the total sum deposited by the plaintiff with the registry of the court.

Conclusions of Law

The Court concludes:

First: That the seven (7) insurance policies involved in this action and assigned to Ralph B. Defenbach by their language recognize the right of the insured to assign the same and that under the terms of the trust agreement dated September

23, 1953, Robert F. Weyen reserved the right to pledge any of such policies as collateral; that the defendant Robert B. Defenbach therefore will recover the net proceeds of all life insurance policies impleaded herein except Policy No. 1 477 698, which was assigned to Elfrieda May.

Second: That the defendant Elfrieda May having not contested the proceeds of Policy No. 1 447 698 insofar as the interests of said minor [11] children were concerned, the defendant E. J. Stanfill as trustee for Daryl Weyen and Carolyn Weyen, minors, will recover the net proceeds on said policy.

Third: None of the defendants will recover any costs against any other defendant or the plaintiff.

Fourth: That the plaintiff having impleaded said policies and having deposited with the registry of the court the net proceeds of said policies and in all ways having complied with their duties in interpleading in said cause, the action insofar as the plaintiff is concerned is dismissed.

Fifth: That the attorneys for the plaintiff are entitled to recover an attorney fee of two percent of the amount deposited with the registry of the court, which fee is allowed together with plaintiff's court costs.

Dated at Spokane, Washington, on this 30th day of December, 1955.

/s/ SAM M. DRIVER,

United States District Judge.

Presented by:

/s/ R. MAX ETTER,

/s/ PAUL C. KEETON,

Attorneys for Defendant Ralph
B. Defenbach.

Acknowledgment of Service Attached. [12]

[Endorsed]: Filed December 30, 1955.

United States District Court for the Eastern Dis-
trict of Washington, Northern Division

No. 1309

SUN LIFE ASSURANCE COMPANY OF CAN-
ADA, a corporation, Plaintiff,

vs.

MARY P. WEYEN, individually and as guardian
of Daryl Weyen and Carolyn Weyen, minors,
ELFRIEDA MAY, RALPH B. DEFEN-
BACH as trustee, E. J. STANFILL as trustee
and E. J. STANFILL as executor of the estate
of Robert Francis Weyen, deceased,
Defendants.

JUDGMENT

The above entitled cause having come on duly
and regularly for trial before the Honorable Sam
M. Driver, Judge of the above entitled court, for
non-jury trial on Tuesday, the 18th day of Octo-
ber, 1955, at the court rooms of the above entitled
court in Spokane, Washington, at 10 o'clock a.m.

the plaintiff being represented by the law firm of Graves, Kizer, Greenough & Gaiser of Spokane, Washington; and the defendant Mary P. Weyen, individually and as guardian of Daryl Weyen and Carolyn Weyen, minors, being represented by S. Dean Arnold of Clarkston, Washington; the defendant Elfrieda May being represented by C. C. Cowan of Spokane, Washington; the defendant Ralph B. Defenbach as trustee being represented by Paul C. Keeton of Lewiston, Idaho, and R. Max Etter of Spokane, Washington; and the defendant E. J. Stanfill as trustee and E. J. Stanfill as executor of the estate of Robert Francis Weyen, deceased, being represented [13] by S. Dean Arnold of Clarkston, Washington. All of the attorneys for the respective parties were present in court; and Elfrieda May, Ralph B. Defenbach and E. J. Stanfill appeared personally.

All parties having announced their readiness to proceed with the trial, the Court heard testimony of witnesses called on behalf of the plaintiff and the defendants and examined documentary evidence introduced by all parties; and the case having been submitted to the Court and Findings of Fact and Conclusions of Law having been entered, and having directed that judgment be entered in accordance therewith,

Now, Therefore, by reason of the law and the findings aforesaid, It Is Ordered, Adjudged and Decreed as follows:

First: That Ralph B. Defenbach, trustee, have

and recover the net proceeds of the following numbered policies, said proceedings having been deposited with the registry of the court, to-wit:

1,852,251 Sun Life Assurance Co. of Canada	\$ 3,683.15
1,952,847 Sun Life Assurance Co. of Canada	9,767.30
1,710,519 Sun Life Assurance Co. of Canada	1,606.58
1,919,863 Sun Life Assurance Co. of Canada	5,746.87
1,755,413 Sun Life Assurance Co. of Canada	1,702.49
1,861,701 Sun Life Insurance Co. of Canada	19,603.42
1,861,700 Sun Life Assurance Co. of Canada	19,603.42

Second: That E. J. Stanfill as trustee for Daryl Weyen and Carolyn Weyen, minors, recover the net proceeds of Policy No. 1,447,698, being \$1,831.20 and said proceeds having been deposited with the registry of the court by the plaintiff;

Third: That the action be, and the same is hereby dismissed insofar as the plaintiff is concerned.

Fourth: That the plaintiff have and recover from the moneys deposited with the registry of the court an attorney fee of two percent of [14] the total sums on deposit; and in addition thereto, that the plaintiff have and recover his court costs necessarily expended in said action.

Fifth: That the defendant Mary P. Weyen, individually and as guardian of Daryl Weyen and Carolyn Weyen, minors, take nothing.

Sixth: That none of the defendants shall recover any costs against any other defendant nor against the plaintiff.

Dated at Spokane, Washington, on this 30th day of December, 1955.

/s/ SAM M. DRIVER,

United States District Judge.

Presented by:

/s/ R. MAX ETTER,

/s/ PAUL C. KEETON,

Attorneys for Ralph B. Defenbach.

Acknowledgment of Service Attached. [15]

[Endorsed]: Filed December 30, 1955.

in the United States District Court, Eastern District of Washington, Northern Division

Civil Actions Nos. 1308-1309

R. MAX ETTER and PAUL C. KEETON,

Petitioners,

vs.

RALPH B. DEFENBACH, as Trustee,

Defendant.

PETITION

Petitioners allege and petition as follows:

I.

That during all of the times herein mentioned petitioners were attorneys-at-law, engaged in the practice of their profession, and they were so engaged in such practice in the United States District Court for the Eastern District of Washington, Northern Division, that defendant, Ralph B. Defenbach, was a creditors' Trustee of certain estate and

properties of a deceased person, to-wit, Robert Weyen, during all the times herein mentioned.

II.

That defendant, Ralph B. Defenbach, was defendant in actions brought and tried in and within the jurisdiction of the United States District Court for the Eastern District of Washington, Northern Division, and that petitioners were counsel for said Ralph B. Defenbach in said actions within the jurisdiction of said Court. That judgments in said actions cannot be satisfied, nor can said actions be disposed of, until petitioners' liens and equity in said judgments have been determined by this Court.

III.

That on or about April 16th, 1955, the said defendant, Ralph B. Defenbach, employed said Paul C. Keeton as an attorney [16] and counsellor at law to represent him in matters which culminated in the representation and trial of cases in the United States District Court for the Eastern District of Washington, Northern Division. That on or about July 8th, 1955, the said defendant also employed petitioner, R. Max Etter, along with Paul C. Keeton, to represent said defendant in matters which were commenced and pending in the United States District Court for the Eastern District of Washington, Northern Division, and that the said petitioners did represent the said defendant in said cases, and in the trial, and to the conclusion thereof in the District Court, to-wit, as follows: Sun Life Assurance Company of Canada

a corporation, plaintiff, vs. Mary P. Weyen, et al., defendants, Civil Action No. 1309; The Maccabees, a fraternal benefit society, plaintiff, vs. Mary P. Weyen individually, et al., defendants, Civil Action No. 1308, United States District Court for the Eastern District of Washington, Northern Division.

IV.

That said actions were successfully prosecuted by the petitioners and that the agreed and reasonable value of the services performed by the said petitioners was, and is, the sum of \$16,500.00, as and for attorneys' fees; that no fee has been paid by defendant, although requested by said petitioners.

V.

That after entry of judgment a check was issued to the petitioners and to defendant, Ralph B. Defenbach, in the sum of \$60,302.94, which is held by said petitioners and has been liened upon by said petitioners; that by reason of affirmance of said cause of action, to-wit, Action No. 1309 by the Court of Appeals for the Ninth Circuit there is also now due and payable to the said defendant in cause of action No. 1308 the sum of \$5,832.00; that on or about the 20th day of June, 1956, Notices of Lien as to claims for fees [17] of petitioners in civil actions Nos. 1309 and 1308, as aforesaid, were filed in the above entitled cases with the Clerk of the United States District Court for the Eastern District of Washington, Northern Division, and likewise signed copies of said Notices of

Lien were sent by registered mail, delivered to and received by the said Ralph B. Defenbach, as Trustee.

VI.

That the agreed and reasonable value of the services performed by the said petitioners is the sum of \$16,500.00, the amount claimed by Notices of Lien in the above entitled actions.

Wherefore, petitioners pray as follows:

1. That the Court order foreclosure of the liens in the above entitled cause for the full amount of \$16,500.00, with interest at the statutory rate from June 20th, 1956; and

2. That the Court award the sum of \$750.00 as attorneys' fees;

3. Award costs of action of said petitioners in said foreclosure;

4. That the Court order the defendant to execute the check now in the possession of the petitioners and pay therefrom the amount of the liens, or, in the alternative, that the said check now held in the possession of the petitioners be returned to the Clerk of the above entitled Court, and the Clerk directed to issue separate checks to petitioners and defendant, paying to petitioners said sum of \$16,500.00 liened upon, and the balance to said defendant, Ralph B. Defenbach, as Trustee.

/s/ F. J. McKEVITT,

Attorney for Petitioners. [18]

Affidavit of Service Attached. [19]

[Endorsed]: Filed January 22, 1957.

[Title of District Court and Causes Nos. 1308-09.]

ANSWER TO PETITION

Answering the petition of R. Max Etter and Paul C. Keeton, defendant admits, denies and alleges:

I.

Admits the allegations of paragraph I.

II.

Admits the first sentence of paragraph II; denies the second sentence of said paragraph II, but defendant admits his willingness and desire to have the Court determine the issues herein involved.

III.

As to paragraph III, admits the first sentence hereof, except as to the date of employment, which defendant denies; as to the second sentence of said paragraph III, denies that R. Max Etter was employed by defendant, although it is admitted that R. Max Etter was employed by Paul C. Keeton with the subsequent acquiescence and consent of defendant, and denies that plaintiffs represented defendant to the conclusion of said cases.

IV.

As to paragraph IV, admits that the actions were successfully prosecuted by the petitioners during the period of their employment, but denies that either the agreed or reasonable value of the services performed by said petitioners was and is the sum of \$16,500. [20]

V.

As to paragraph V admits all of said paragraph, except that defendant denies the validity of any liens aggregating \$16,500.

VI.

As to paragraph VI, denies each and every allegation therein contained.

/s/ THOS. MALOTT,
Attorney for Defendant. [21]

NOTICE OF MOTION

To: Defendant Ralph B. Defenbach and to Paine, Lowe, Coffin & Herman, his attorneys:

You and Each of You Will Please Take Notice that the foregoing and hereto attached Motion to Supplement the record will be presented to the Honorable Sam M. Driver, Judge of the above entitled court at the Federal Court Building at Spokane, Washington, on Friday, August 3, 1956, at 10:00 o'clock a.m. of said day, and defendants J. E. Stanfill as trustee and Elfrieda May, will at such time and place request an Order directing that the record be supplemented accordingly.

This motion is made and based upon the files and records herein and upon Rule 75 of Federal Court Rules.

Dated this 25th day of July, 1956.

C. C. ROWAN,

S. DEAN ARNOLD,

Attorneys for Defendants

E. J. Stanfill as trustee
and Elfrieda May.

Acknowledgment of Service Attached. [22]

[Endorsed]: Filed January 31, 1957.

Title of District Court and Causes Nos. 1308-09.]

PETITIONERS' PROPOSED FINDINGS OF
FACT AND CONCLUSIONS OF LAW

This matter coming on for hearing before me on the 31st day of January, 1957, on petition of R. Max Etter and Paul C. Keeton to foreclose an attorneys' lien and to fix the amount of fees to which petitioners are entitled in causes Nos. 1308 and 1309 of the files and records of the above entitled court. Petitioners appeared in person and were represented by their counsel, F. J. McKevitt. Defendant appeared in person and was represented by his attorney, Thomas Malott. The Court having heard the evidence of both parties and having considered the briefs filed by the respective parties in said causes and being fully advised in the premises, makes the following:

Findings of Fact

I.

That defendant by stipulation made in open court conceded the power of the Court to fore-

close said lien, and in his answer admitted his willingness and desire to have the Court determine the issues involved in the petition of petitioners.

II.

That without any specific contract as to attorneys' fees, petitioners for and on behalf of said defendant and at [23] his instance and request rendered legal services in causes Nos. 1308 and 1309 in the above entitled Court, in which causes the defendant, Ralph B. Defenbach, as Trustee, was successful.

III.

That for all practical purposes the employment of said petitioners by said defendant was on the basis of a contingent fee, since it appears from the evidence introduced in said causes that said petitioners would not have been paid a flat fee if the litigation which they conducted had not terminated successfully.

IV.

That the fair and reasonable value of the services rendered by said petitioners on behalf of the defendant, Ralph B. Defenbach, as Trustee, is the sum of \$15,000.00.

From the foregoing Findings of Fact the Court makes the following:

Conclusions of Law

I.

That petitioners are entitled to recover for their services the sum of \$15,000.00.

Done in open Court this 8th day of February,
1957.

/s/ SAM M. DRIVER,
Judge.

Presented by Attorney:

/s/ F. J. McKEVITT. [24]

[Letterhead of
Thomas Malott and Sidney Schulein.]

Mr. Frank J. McKevitt
Attorney at Law
Old National Bank Building
Spokane 1, Washington

February 4, 1957

Re: Etter et al. v. Defenbach, as Trustee

Dear Frank:

I return herewith the proposed Findings of Fact and Conclusions of Law, together with Judgment in this case, copies of which I have received.

I did not acknowledge service or O.K. as to form or the reason that I felt that the drafting of the proposed Findings of Fact and Conclusions of Law at this time is premature. You propose a finding that

“petitioners would not have been paid a flat fee if the litigation which they conducted had not terminated successfully”

which is, of course, at variance with the letter written by Mr. Etter. I know that there is going to be a finding that a fee should be allowed but I do feel that it would be premature to accept from

you or propose to you any findings until we understand the Court's ruling.

I am, yours very truly,

/s/ THOMAS MALOTT.

TM:GN cc—Stanley D. Taylor [25]

[Endorsed]: Filed February 8, 1957.

In the District Court of the United States, Eastern District of Washington, Northern Division

Nos. 1308-1309

R. MAX ETTER and PAUL C. KEETON,
Petitioners,
vs.

RALPH B. DEFENBACH, as Trustee,
Defendant.

JUDGMENT

This matter coming on for hearing before me on the 31st day of January, 1957, on petition of R. Max Etter and Paul C. Keeton to foreclose an attorneys' lien and to fix the amount of fees to which petitioners are entitled in causes Nos. 1308 and 1309 of the files and records of the above entitled Court. Petitioners appeared in person and were represented by their counsel, F. J. McKevitt. Defendant appeared in person and was represented by his attorney, Thomas Malott. The Court having heard the evidence of both parties and having considered the briefs filed by the respective parties

in said causes and being fully advised in the premises, and having heretofore made its Findings of Fact and Conclusions of Law herein, it is

Ordered, Adjudged and Decreed that said lien be and the same is hereby foreclosed and that petitioners above named be and they are hereby awarded the sum of \$15,000.00 as and for legal services rendered in Causes Nos. 1308 and 1309. It is further

Ordered, Adjudged and Decreed that that one certain check No. 3359, issued by the Clerk of the above entitled Court on February 29, 1956, in the sum of \$60,302.94, and made payable jointly to R. Max Etter, Paul C. Keeton and Ralph B. Defenbach, as Trustee, he returned to the Clerk of [26] the above entitled Court and that there be disbursed therefrom the sum of \$15,000.00, payable to R. Max Etter and Paul C. Keeton, and the sum of \$45,302.94, payable to Ralph B. Defenbach, as Trustee.

Done in Open Court this 8th day of February, 1957.

/s/ SAM M. DRIVER,
Judge.

Presented by Attorney:

/s/ F. J. McKEVITT. [27]

[Endorsed]: Filed February 8, 1957.

[Title of District Court and Causes Nos. 1308-09.]

NOTICE OF APPEAL

Notice Is Hereby Given that Ralph B. Defenbach, as trustee, the defendant above named, does hereby appeal to the United States Court of Appeals for the Ninth Circuit, from the order and judgment fixing and allowing attorneys' fees to petitioners above named, entered in the above actions on February 8, 1957.

/s/ THOMAS MALOTT,
Attorney for Defendant.

Affidavit of Service by Mail Attached. [28]

[Endorsed]: Filed March 8, 1957.

United States District Court, Eastern District
of Washington, Northern Division

Civil Nos. 1308-1309

R. MAX ETTER and PAUL C. KEETON,
Petitioners,

vs.

RALPH B. DEFENBACH, as Trustee,
Defendant.

RECORD OF PROCEEDINGS

Be It Remembered that the above-entitled cause came on for hearing at Spokane, Washington, on Thursday, January 31, 1957, before the Honorable Sam M. Driver, Judge of the above-entitled Court;

the petitioners being personally present and represented by Francis J. McKevitt; the defendant being personally present and represented by Thomas Malott;

Whereupon, the following proceedings were had, to-wit: [31]

The Court: Let's see, that brings us down to the final one, Etter and Keeton against Defenbach.

Mr. McKevitt: Yes, your Honor. Shall I proceed, your Honor?

Mr. Malott: Before you proceed, Mr. McKevitt, please, I hand to the Court—I don't know whether that calls for an answer—I filed an answer.

The Court: It may be filed. I would like the record to show, however, that both parties here through counsel, Etter and Keeton, plaintiffs, and Defenbach, Trustee, the defendant, are willing to submit this matter to the Court on the merits this afternoon.

Mr. McKevitt: That is correct.

The Court: All right.

Mr. Malott: Yes.

Mr. McKevitt: I think preliminarily I should state to your Honor and for your Honor's information that in the case of Stanfill, as Trustee, and Elfrieda May, Appellants, vs. Defenbach, appeal was from the judgment entered by your Honor. As you will recall, that judgment was entered December 30, 1955. Of course, the opinion of the Court having been rendered on January 4, 1957, the mandate of the Court is not down and we are greeable——

The Court: Final order should not be entered until the mandate gets down. [32]

Mr. McKevitt: That is correct.

The Court: I can announce my decision, but it shouldn't be entered until the mandate comes down.

Mr. McKevitt: Very well.

The Court: I wonder if counsel would stipulate that the Court may take notice of all matters that came before the Court in the trial as to the character of the work done, the issues, and——

Mr. Malott: I will so stipulate. I would hope that the Court in taking notice of those things would in its opinion mention those things of which it does take notice, thereby become part of the record.

The Court: Yes, I see.

Mr. McKevitt: In connection with that observation, your Honor, I spoke to Mr. Malott several days ago and he is agreeable to having the formal records in the other cases considered. I think the number is 1309, isn't it?

The Clerk: 1308 and 1309, the case that was tried.

The Court: I haven't had an opportunity to read your answer here, of course.

Mr. McKevitt: I can review it very briefly.

The Court: Well, I just wanted to ask this question: Is the issue here merely the amount of the attorney fees, or do you question the plaintiffs' right to collect any attorney fee? [33]

Mr. Malott: No question. No, we submit that an

attorney fee should be fixed and we are just as anxious——

The Court: Do you both agree on the basis of what is a reasonable fee for the services rendered?

Mr. Malott: I think not. I think there is quite a sharp conflict as to the basis, as to whether it is a contractual fee or whether it is quantum meruit.

The Court: Is it a claimed contractual fee?

Mr. McKevitt: We have alleged, as we are permitted to do, as your Honor well knows, in the petition that the amount which they are seeking to recover, Mr. Keeton and Mr. Etter, some \$16,500, we believe, was the agreed and reasonable value of the service. However, I will say at the outset now that we are not in a position to establish a definite contract between these attorneys and Mr. Defenbach as to any fee, contingent or otherwise, and we are here on the basis that this amount of \$16,500 is a reasonable fee, under all the circumstances, to be allowed.

The Court: Mr. Defenbach was trustee for the benefit of the creditors of the deceased, wasn't he?

Mr. McKevitt: That is correct, your Honor.

The Court: And was in Idaho.

Mr. Keeton: Yes, Lewiston.

The Court: Is it under some state procedure [34] such as our assignment for the benefit of creditors here in Washington?

Mr. Keeton: Same sort of a proposition.

The Court: More or less out of court?

Mr. Keeton: Out of court.

The Court: The trustee isn't subject to the immediate supervision of the court, then?

Mr. Keeton: No, your Honor.

The Court: I see, all right.

Mr. Malott: Just clarification, Mr. Defenbach tells me, however, that it has been the plan of the creditors in this case all the way through to submit the final account to a court, but it isn't mandatory.

Mr. McKevitt: With reference to stipulating that the records in 1308 and 1309 and reply, I have called them, Mr. Taylor may be considered as exhibits in this case, at least down to and including the entry of the judgment in the case in December—what was the date of that, Paul?

Mr. Keeton: December 29th.

Mr. McKevitt: December 30, 1955; that following the entry of that judgment, and through circumstances that are not here material, the service of yourself and Mr. Etter were terminated; is that not correct?

Mr. Keeton: Shortly thereafter. I don't wish to [35] be a player leaping from the bench, but the Th Macabees case was also involved in this, and your Honor should look at the two cases, Sun Life Assurance and Macabees.

The Court: Well, yes, I think I said "in this case," but there were two of them that were tried. Perhaps you should refer to them by number.

Mr. McKevitt: Is it 1308 and 9, is one, the Sun Life, and the other Macabees?

The Clerk: Yes, sir. Sun Life Assurance is No. 1309; the Macabees is No. 1308.

The Court: All right.

The Clerk: And, your Honor, 1308 was not tried.

The Court: 1308.

Mr. McKevitt: That was The Macabees case.

The Court: Yes.

The Clerk: That was The Macabees.

The Court: The same issues were involved.

Mr. McKevitt: The Sun Life Assurance determined the outcome of the other case.

Mr. Malott: Why not extend the stipulation that the files may be considered for all purposes in so far as they may be material? You tried to qualify it.

The Court: I think his qualification was up to the time of the termination of the employment of the plaintiffs. [36]

Mr. McKevitt: Yes, because they did not participate directly in the appeal to the Circuit Court of Appeals, although they did participate, as we will attempt to show, indirectly in a very substantial manner by virtue of the legal groundwork they had laid before your Honor, which quite simplified, we think, the task of the firm that took the case to the Circuit Court of Appeals.

With that statement, and your Honor being then informed as to the nature of the petition and the defendant's answer, may I proceed with the testimony?

The Court: Yes.

Mr. McKevitt: I would like to put Mr. Keeton on the witness stand.

The Court: Unless you have an opening statement to make, Mr. Malott.

Mr. Malott: No, I think not, I will reserve.

PAUL C. KEETON

a petitioner herein, called and sworn as a witness on his own behalf, was examined and testified as follows:

Direct Examination

Q. (By Mr. McKevitt): Your name is Paul C. Keeton? A. Yes, sir.

Q. You are one of the petitioners in this proceeding? A. I am. [37]

Q. You reside in Lewiston, Idaho?

A. I do.

Q. Practicing lawyer? A. Yes, sir.

Q. Admitted to practice in the State of Idaho State and Federal Courts? A. I am.

Q. And you have, I understand, occasional practice in the State and Federal Courts in Washington?

A. I am admitted in this Federal Court here.

Q. Mr. Keeton, how long have you been practicing law?

A. I have been practicing law 17 years.

Q. And in connection with your practice, I assume that you have had occasion to represent both plaintiffs and defendants in trials of contested actions before courts and before juries?

A. Yes, I have a general practice, doing both.

Q. Been in court on numerous occasions?

A. Yes.

(Testimony of Paul C. Keeton.)

Q. Been before the Supreme Court of your own state, I take it, on numerous occasions?

A. On numerous occasions.

Q. Yes. Well, now, I would like to ask you first, when did you first become acquainted with Mr. Robert Weyen? [38]

Mr. McKevitt: I might say he was the deceased insured in these policies, your Honor.

The Court: Yes.

A. 1954.

Q. (By Mr. McKevitt): Briefly explain to the Court how that acquaintanceship arose and what followed after so far as any legal phase is concerned.

A. Well, Mr. Weyen was logging in and about Lewiston and on several occasions I worked his income tax returns and did small logging contract jobs for him.

Q. Now, with reference to the matter in issue in this action, when did you meet Mr. Defenbach? I don't know how you pronounce that.

A. When did I first become acquainted with Mr. Defenbach?

Q. Yes, first?

A. I have known him for a long time. 1945.

Q. You have done legal work for Mr. Defenbach prior to this time?

A. Not for him, but he does tax work and frequently he has done tax work on estates or other matters that I had.

Q. Well, now, in connection with this contro-

(Testimony of Paul C. Keeton.)

versy here, Mr. Keeton, when did you first have any——

A. Well, Mr. Defenbach had been doing some tax work for Mr. Weyen—in fact, I had recommended that Mr. Weyen [39] see Mr. Defenbach probably in 1952 or '53, along in there, and he had worked several tax returns for him. And then Mr. Weyen was in grave financial difficulties in 1954, so a creditors pool agreement was set up, which is an exhibit in the Sun Life case, and Mr. Defenbach was designated as the trustee for the creditors in that pool. I prepared the pool agreement and had many discussions with Mr. Defenbach in and about that time and thereafter.

Q. That is the same agreement of November 16 1954?

A. Yes. Of course, I was not representing Mr. Defenbach at that time, however.

Q. No, I understand. A. Yes.

Q. But briefly, and with reference to the financial difficulties of Mr. Weyen and at the time of the execution of that agreement, approximately what was his indebtedness?

A. Well, it would be over \$200,000 on open accounts and secured accounts.

Q. And what, if anything, did he have by way of assets at the time he entered into this agreement?

A. Well, he had a going logging job and tractor and logging equipment. Of course, all of which were

(Testimony of Paul C. Keeton.)

under chattel mortgages or conditional sales contracts. [40]

Q. At the time that agreement of November, '54 was entered into, you, of course, I take it, were fully familiar with the prior agreement that is, we might say, the Stanfill Trust?

A. No, I was not.

Q. You were not acquainted with that at that time? A. No, sir.

Q. And then following the execution of the agreement of November of 1954, you ascertained in the course of its preparation the existence of certain policies of life insurance on Mr. Weyen, did you not?

A. Yes, there were several with the Sun Life and several with The Macabees—at least one with The Macabees—and two were with the Mutual Health Benefit and Accident Association, which were placed in the pool with Mr. Defenbach as beneficiary in the event of Mr. Weyen's death.

Q. And this pool was for the benefit of the creditors, secured and unsecured, of Mr. Weyen?

A. About \$68,000 worth of unsecured creditors and about \$140,000 worth of secured creditors.

Q. Yes.

The Court: What was the security on, Mr. Keeton? On his equipment?

A. On tractors and loaders, and so forth. [41]

The Court: All right.

Q. (By Mr. McKevitt): And, of course, you ascertained the existence of the Stanfill Trust some-

(Testimony of Paul C. Keeton.)

time subsequent to the execution of the agreement of 1954?

A. I am certain that the first time I became acquainted with the so-called Stanfill Trust was after his death.

Q. And then after a study of that trust, you observed the distinction between its provisions and the one that you drew? A. Yes.

Q. And the primary difference was what?

A. Well——

Q. Having reference now, we'll say, to the children?

A. Well, in the Stanfill Trust, of course, the children would have got all of the insurance money and in the so-called Defenbach Trust, it would have gone to the creditors, secured and unsecured.

Q. To the exclusion of the children?

A. To the exclusion of the children.

Q. You spoke now of certain policies of insurance issued by Sun Life Assurance Company. I will ask you if the aggregate amount of these policies was not \$60,303.92?

A. That is exactly it, with double indemnity.

Q. They had double indemnity provisions?

A. That's right. [42]

Q. Mr. Weyen came to his death accidentally?

A. He died April 16, 1955.

Q. And The Macabees Insurance Company policy, the aggregate sum of \$5,832?

A. That was a \$3,000 policy with double inden

Testimony of Paul C. Keeton.)

ity, and then the reason it doesn't quite total six
s there was a loan against it.

Q. But the amount of it, at any rate, was \$5,832,
s that correct? A. That is exactly.

Q. Now, you spoke also of one or two policies,
believe, in the Mutual Benefit of Omaha. One was
or \$2,500 and the other for \$5,000?

A. That is correct.

Q. But they didn't enter into the litigation out
f which this litigation has arisen, did they?

A. No. If you wish, I can explain that very
quickly how that happened.

Q. Yes, I wish you would for the benefit of the
ourt.

A. All right. As soon as Mr. Weyen died, Mr.
efenbach and I discussed the matter of collecting
e insurance policies to put the money in this pool
nd I wrote letters to the Sun Life and to The
acabees and found out very shortly after his
eath that his ex-wife had protested the payments,
at his mother had protested [43] the payments,
at Mr. Stanfill, on account of the Stanfill Trust,
nd protested the payments; but on the two poli-
es from the Mutual Health, Accident and Benefit
ssociation, for some reason they put in no proof.
o immediately I procured claims from them, Mr.
efenbach and I filled them out, we sent them
mediately in, and, of course, they immediately
aid, but on all the others, the Sun Life and The
acabees, they refused to pay any money to anyone.

Q. Well, what you did then was get into the

(Testimony of Paul C. Keeton.)

hands of Mr. Defenbach shortly after the death of Mr. Weyen at least the proceeds of the Omaha Policies? A. Which was about \$8,000.

Q. I believe that we listed then 2,500 in one and 5,000 in the other.

A. Yes, and if you die under those policies, they pay you back all the premium you paid in. I don't understand it, but that is how it came to be over \$8,000.

Q. Do you want to amplify that any further Paul, in connection with those two policies?

A. No.

Q. That is——

A. That is where actually I started representing Mr. Defenbach as trustee for the pool, was right at that time, immediately following the death. [44]

Q. Then, particularly in connection with those two policies?

A. And with the Sun Life and The Macabees, of course, which I got turned down on.

Q. Yes. Well, now, in connection with the Sun Life policies, which we have pointed out to him. Honor aggregate some \$60,302, and prior to the institution of this action brought on behalf of Defenbach as trustee, did you have any conference with other attorneys or representatives of other claimants?

A. Yes, I had conferences with Mr. Defenbach on several occasions.

Q. When did they take place?

A. They took place in my office——

Testimony of Paul C. Keeton.)

Q. At Lewiston?

A. —explaining to him that the payment of the policies had been protested, and then on July 1st, in the office of Mr. Paul Hyatt in Lewiston, a meeting was held, at which meeting there were present Mr. Defenbach, Mr. Russell Randall—

Q. He is an attorney at Lewiston?

A. Mr. Hyatt, Mr. C. C. Rowan of Spokane, an interested creditor in this matter, and myself.

Q. What was the purpose of that meeting?

A. Well, Mr. Rowan had come down to advise us that there [45] was going to be filed an interpleader action by the Sun Life Company and that he had thoroughly briefed the law and that the money would all go into the Stanfill Trust.

Q. Which you considered as being tantamount to declaration that the assignment that you drew wasn't of much legal validity?

A. He said on that day that the Stanfill Trust was irrevocable on many and many occasions. He emphasized it was irrevocable and that he, representing Mrs. May and indirectly the children under the Stanfill Trust, would recover all the money.

Q. And those assertions, or some of them, on the part of Mr. Rowan, were they made in the presence of Mr. Defenbach?

A. All of them were made in his presence.

Q. Did he exhibit some concern about the legal position that was taken by Mr. Rowan?

A. Well, in a *clam* way, yes.

Q. Well, then, were there any conferences of

(Testimony of Paul C. Keeton.)

that nature such as you have narrated subsequent to the ones that you just referred to and prior to the institution of the interpleader action?

A. No, there were no more conferences until after the filing of the interpleader action, which was—well, [46] very shortly thereafter. That was filed about the 10th of July or something very close to that.

Q. Did you make an explanation to Mr. Defenbach about the nature of this interpleader action and why it was brought, and so on?

A. Oh, yes, Mr. Defenbach understood that the insurance company couldn't determine who were the proper claimants on these policies, that there was a manner by which they could sue everyone that was interested, and I advised him that that would happen and he would surely be served with process, and then shortly thereafter he was served with process, which he brought to my office.

Q. In other words, you advised him that the insurance companies were not going to take upon themselves the responsibility of determining the disbursements of these funds, is that true?

A. I advised that it was a certainty that an interpleader action would be filed in the case, yes.

Q. Well, now, after the interpleader action was filed and was served, of course, he delivered the complaint to you? A. Yes.

Q. What did you then do in connection with that litigation?

A. I discussed the interpleader case all over

(Testimony of Paul C. Keeton.)

and it had [47] been filed in the District Court for the Eastern District of Washington in Spokane County and so I made arrangements thereafter, either by letter or telephone, with Mr. Etter to join with me under the rules of the court, and I took it on myself to prepare entirely——

Q. Before you get to that, Paul, did you advise Mr. Defenbach that you were going to associate Mr. Etter and why you thought he should be associated?

A. I am certain that I told Mr. Defenbach that I was going to associate Mr. Etter, yes. Whether I advised him of the court rule here that it was necessary, I am not——

Mr. Malott: You advised him before, in advance?

Mr. McKevitt: Before he employed him.

Q. Well, in other words, you considered it necessary to have a Washington legal representation in connection with your services, is that true?

A. I did.

Q. Now, do you recall then when, if there was, the first meeting in which Mr. Defenbach and yourself and Mr. Etter were present in connection with this litigation?

A. No, I'm not sure of the first time. I can tell you one of the times, which would have been the 17th day of October of 1955.

Q. Well, prior to that time, had there been any discussion [48] between Mr. Defenbach and yourself concerning attorney fees?

A. Yes, I discussed it with Mr. Defenbach.

(Testimony of Paul C. Keeton.)

Q. And what was the result of that discussion? What did you say to him and the substance and what did he say to you?

A. Well, Mr. Defenbach told me on many occasions that his position was a very vague one; that he didn't know what he could do with the approximately \$8,000 that he had on hand. There were 40,000, or in that neighborhood, of tax liens.

Q. State and Federal? A. State and——

Mr. Malott: Pardon me, are you narrating conversation or giving background? I don't care, but I wish you would distinguish.

A. I am narrating conversation.

Mr. Malott: Okay.

A. Mr. Defenbach and I discussed the tax liens which were on this money, aggregating, I think 36,000 plus, for sure—in fact, I have them all here the tax liens; that also Mr. Weyen had been accused by the Federal Government of a timber trespass and both Mr. Defenbach and I had been warned by the United States Attorney that they claimed a priority on any moneys in this [49] creditors' pool first, and also the United States Attorney advised Mr. Defenbach by letter that he would hold Mr. Defenbach personally liable if he paid out any creditors or anybody ahead of the U. S. Government on both the tax liens and the timber trespass, and I have his letter right here if you would like to see it.

Q. (By Mr. McKevitt): Well, at any time then and because of his feeling in that regard, did he

(Testimony of Paul C. Keeton.)

advance you any moneys of any kind or character by way of expense or anything else?

A. He did not.

The Court: I don't think it makes any difference, probably, but is that the United States Attorney for the District of Idaho?

A. Yes, sir.

The Court: Yes, all right.

Q. (By Mr. McKevitt): Do you have a copy of that letter?

The Court: I don't care to see the letter, I just was curious to know whether it was this office or the Idaho office. It doesn't make any difference.

Mr. McKevitt: It is a very peremptory demand—I don't mean peremptory, but I mean very indicative of their position.

The Witness: I might state one more thing, [50] Mr. McKevitt.

Q. Go ahead.

A. Regarding the holding of the moneys in the fund, immediately after Mr. Weyen's death, the Bureau of Internal Revenue notified Mr. Defenbach that they were going to go back several years and audit Mr. Weyen's tax returns for income tax assessments or violation and that he would have to impound all of his records and hold all of his records together undisturbed, so to speak. So Mr. Defenbach rented an office in the same building that my office is in, these records were impounded in that building, and on account of the letter which Mr. Defenbach is looking at now, no moneys were

(Testimony of Paul C. Keeton.)

paid out on that office for the rent, which was accruing at the rate of \$25 per month, for eleven and one-fifth months.

Q. And while we are on that subject, is it not the fact that the payment was finally made after the entry of judgment in this court; is that true?

A. The payment of the rent was made three and a half months after the entry of the judgment in this Court on March 14, 1956. There is the receipt for the rent (indicating).

Q. Well, now, can that chronologically bring us down to a meeting then had between yourself and [51] Mr. Etter and Mr. Defenbach? A. Yes.

Q. All right, tell the Court about that.

A. Well, I had had discussions, as I said, with Mr. Defenbach about what to do with the 8,000 some odd dollars there were on hand on numerous occasions. He told me that until his position was clarified, he wasn't going to do anything with it or pay it out at all, because the government might consider him what they call a transferee and also——

Mr. Malott: Pardon me, Mr. Keeton, are you now narrating, telling of the conversation in Mr. Etter's office?

A. No, I am not.

Mr. Malott: I think that was the question.

A. It is not responsive, I will answer it.

Mr. Malott: I don't want to be technical, but I am trying to distinguish between conversation and background.

Testimony of Paul C. Keeton.)

Mr. McKevitt: I see.

Mr. Malott: That is what I am trying to do.

The Court: That was just introductory, probably. Your question called for conversation in Mr. Etter's office.

Mr. McKevitt: Well, I don't know whether it was in [52] Mr. Etter's office, but where the three of them were present. I think the three were in Spokane.

A. All right, there were three——

Mr. Malott: Pardon me, if you will just try to distinguish. I have no objection to giving background if you try to distinguish between background and direct conversation.

A. I will tell the time and place of each conversation.

Mr. Malott: Yes.

A. The day before the trial on October 17th of 1955, Mr. Defenbach had come from Lewiston and I had I and we were over in the Ridpath Hotel. At that time I told Mr. Defenbach that I had prepared a letter that I was going to give him concerning a fee arrangement in this case, as we had had none so far. He told me that it would be no use because he felt that he had no authority whatsoever to make any fee in the case; there would be no use to talk with him about any agreement or any fees in the case.

And I went over to Mr. Etter's office and told that to Mr. Etter, and he came back with me to the hotel.

(Testimony of Paul C. Keeton.)

Q. (By Mr. McKevitt): Well, maybe we haven't established when Mr. Etter definitely came into the litigation after the interpleader action was filed.

A. Mr. Etter came into the litigation on 7-25-55

The Court: I am going to take a recess now and I have asked for presentence investigation reports in three criminal cases and if they are ready I think I will take them up right after the recess. Shouldn't take very long.

(Whereupon, a recess was taken.)

Q. (By Mr. McKevitt): Now, with reference to any meeting that was had between you and Mr. Etter and Mr. Defenbach and pertaining to this litigation, when did you say that took place and where?

A. Well, it took place the night before the trial on the 17th in the Ridpath Hotel.

Q. Three of you present?

A. Three of us present.

Q. Was there a fee discussion, a discussion about fees?

A. Yes, I had been to Mr. Etter's office and told him that——

Mr. Malott: Pardon me, I wish you would try to stick to the discussion.

A. Yes, there was a discussion about fees at that time.

Q. (By Mr. McKevitt): The three of you there

A. Yes.

Q. What was that discussion? What was said?

A. Well, Mr. Defenbach said that on account of

Testimony of Paul C. Keeton.)

the tax liens and various restraints that were put on that, that [54] he would not be able to pay any fees at that time.

Q. And was he concerned at all about any information he had received from the Federal Government about possible personal liability on his part? A. Yes, he was.

Q. Is that referred to in this letter of November 16, 1955 to Mr. Defenbach from the United States Attorney in Boise? A. That's right.

Q. Well, now, in this conversation in this meeting here in Spokane, did Mr. Etter make any observation to Mr. Defenbach about fees?

A. Well, Mr. Etter wanted a retainer fee on the case. He asked Mr. Defenbach for a retainer fee on the case, and Mr. Defenbach explained, as I have said, that he would not pay any of this money out on account of the fact of all these prior claims, and also that under the Defenbach Trust-agreement of November 15th——

Q. 1954.

A. ——1954, in that agreement the government has a priority to any moneys that come into the pool. So Mr. Etter at that time said: "Well, under those circumstances, we take these cases on a contingent fee or handle them on a contingent fee."

Q. Did Mr. Etter make any observation as to [5] the amount of the contingent fee?

A. He talked about percentages, yes. He talked about 25 per cent if settled, 30 per cent if tried,

(Testimony of Paul C. Keeton.)

and 40 per cent if appealed, and Mr. Defenbach said that he could not agree to anything.

Q. Well, did he say anything with reference to the reasonableness or unreasonableness of such an arrangement if he had been able to enter into it?

A. He said——

Mr. Malott: Objected to, if the Court please, it is for the purpose of proving a contract.

The Court: No——

Mr. McKevitt: No, it isn't for the purpose of proving a contract.

Mr. Malott: The witness is not an expert on the thing and his opinion would not——

The Court: Well, it might be an admission against interest. I will let him answer.

Mr. McKevitt: My position was, accepting that to be true, that it showed that he considered at that time the fee to be reasonable. That is my purpose, your Honor.

The Court: I see.

A. He said that he had no objection to that type of arrangement, but, however, he would not agree to it.

Q. Is that where the matter then was left [56] standing so far as fees were concerned?

A. That was where the matter was left standing.

Q. Now, with reference to certain items of expense entailed by yourself coming to Spokane from Lewiston, going back, and remaining here and other items, were they all paid out of your personal account?

(Testimony of Paul C. Keeton.)

A. Paid all my expenses out of my own personal account.

Q. What do they amount to? Do you have a record of them?

A. Well, I was in to Spokane seven times.

Q. In connection with this litigation?

A. This litigation, and my hotel bills were \$8.12, \$5.17, \$18.15, \$50.53, \$9, \$14.92.

The Court: The plaintiffs are not claiming this in addition to showing what was expended? All right, go ahead.

Mr. McKevitt: Yes, your Honor.

Mr. Malott: I got a total of \$105.89 on that.

The Court: Is that correct, \$105.89?

Mr. Malott: Very quickly added.

The Court: Go ahead.

A. In addition to that, I drove my car on those occasions and it was 225 miles from here to Lewiston roundtrip and I would figure that it would cost you a minimum to drive your car back and forth \$70 on seven trips.

Q. (By Mr. McKevitt): Now, Mr. Keeton, you [57] referred to certain tax liens——

Mr. McKevitt: And I think for the purpose of this record, your Honor, to protect it, I better have them marked.

The Court: All right.

Mr. McKevitt: Reduced and produced in evidence. And while the Clerk is marking those, it isn't our intention to encumber the record with

(Testimony of Paul C. Keeton.)

to make in this connection that I have overlooked asking you? A. No, I don't think so.

Q. Oh, by the way, after the entry of judgment, is it not a fact that the appeal steps that were initiated by Mr. Defenbach up to a certain point, that they were processed through Mr. Etter's office?

A. Well, yes, all of the appeal was processed [60] through either his office or mine up until, oh, sometime maybe as late as June of '56.

Q. Well, the perfecting of the appeal would be by Defenbach, but I mean the records on appeal were submitted to Mr. Etter and to you?

A. That's right.

Q. For examination? A. That's right.

Q. And the records were examined on appeal were they, by you and Mr. Etter?

A. That's right.

Q. Now, Mr. Keeton, do you have an opinion then as to the reasonable value of your services rendered in this litigation by yourself and Mr. Etter? Do you have an opinion?

A. Yes, I have an opinion.

Q. What is it?

A. I have an opinion that we are entitled to 20 per cent of the recovery in this case.

Mr. McKevitt: You may examine.

Cross Examination

Q. (By Mr. Malott): How long did this trial last, the trial proper, last? A. One day. [61]

Q. One day. What time of the day did it start

(Testimony of Paul C. Keeton.)

A. Oh, I think shortly after 10 in the morning.

Q. What time did it close?

A. Oh, I think around 3 in the afternoon.

Q. And then prior to that time, what preliminary motions did you have in court?

A. Well, we will have to have the docket.

Q. If you can recall how many times you were in court on preliminary motions?

A. May I ask a question off the record? Do you mean how many times was I in court or he, or both of us?

Q. I am going to cover both of you.

A. All right. Prior to the trial, I would say four times, by looking at this fast.

Q. What were those matters that you were in here on? Let me ask you this, was there a pre-trial? A. No pre-trial conference.

Q. Was there a motion to dismiss?

A. No motion to dismiss.

Q. What was the nature of the preliminary matters that you handled, then? I am just going to ask the question. If you want to confer with Mr. Etter, I have no objection, if it is all right with the Court, Mr. Etter can answer better.

A. Well, why don't we offer the docket, if you wouldn't care? [62]

Mr. McKevitt: Let's see it.

A. I might say that I wasn't up here so I don't know how many times.

Mr. Malott: I see.

Mr. McKevitt: Would you mark that as a peti-

(Testimony of Paul C. Keeton.)

tioners' exhibit and we will offer it in evidence?

The Clerk: Marking Petitioners' B.

The Court: All right.

Q. (By Mr. Malott): Now, Mr. Keeton, at the outset, at the beginning of this matter when you first undertook employment, didn't you and Mr. Defenbach agree both with each other that you would defer the matter of asking for fees until the matter was brought to a conclusion, and that at that time you would look at the over-all results and what had happened in the thing and both render your bills at that later date when the matter was all wound up?

A. That is a part of the discussion, yes.

Q. At the outset, it was so agreed, wasn't it?

A. If you add certain things to it, it was, yes.

Q. Now, the next thing I wanted to ask you you stated on direct examination that prior to associating Mr. Etter in this proceeding you advised Mr. Defenbach of your intention so to do. I am going to ask you, isn't [63] it a fact that you did not tell him before associating Mr. Etter?

The Court: Pardon me, this has been offered. Have you any objection to it?

Mr. Malott: I didn't know it had been offered. Well, this is the Clerk's—

A. That is our docket.

The Court: No, that is their docket.

The Clerk: That isn't the Clerk's.

Mr. Malott: I would prefer to have Mr. Etter testify before it is admitted.

Testimony of Paul C. Keeton.)

The Court: Well, all right.

Mr. Malott: I am objecting as to no sufficient identification.

The Court: All right. No, there isn't.

The Witness: It could be, Mr. Malott, that I prepared the answer to this interpleader case; that I talked with Mr. Etter about it, that we signed our names to it, and to file it up here, I had to have Washington counsel, and it could be either before or at the time or immediately after that that I advised Mr. Defenbach, but Mr. Defenbach knew very early in this litigation that Mr. Etter was in the case.

Q. (By Mr. Malott): Oh, yes. Please understand I am not making any accusations that there [64] is anything wrong, I am simply asking if the voice was not yours and actually Mr. Etter was employed by you? A. I picked him out.

Q. Yes, you picked him out. And now with reference to these matters of the claims of the taxing agencies, these tax liens, you had conferences with the Director of Internal Revenue relative to administration of this estate and using the money of the estate for the purpose of carrying on this litigation, didn't you? A. I never did.

Q. You never did.

Mr. Malott: Will you mark this, please?

The Clerk: I have marked this as Respondent's C for identification.

Mr. Malott: Do you have any objection to Respondent's C? That is the letter——

(Testimony of Paul C. Keeton.)

Mr. McKevitt: I haven't read this.

The Witness: You have read that, sure.

Mr. McKevitt: It is your exhibit? Oh. We have no objection.

The Court: It will be admitted.

(Whereupon, the said letter was admitted in evidence as Respondent's Exhibit C.)

[See pages 130-131.]

Q. (By Mr. Malott): Showing you Respondent's Exhibit C, I [65] wonder if Mr. Defenbach or somebody underscored a portion of it. That has been underscored, "that before paying creditors," that has been underscored in the courtroom, has it not? A. Yes.

Mr. McKevitt: I think I did that, Tom.

Mr. Malott: Oh, did you do it? Mr. McKevitt then, underscored it.

Just to summarize, if I may, this Exhibit C letter from the United States Attorney in Boise pointing out the existence to Mr. Defenbach and advising him of tax liens, of a judgment against Mr. Weyen for \$444 and a claim of the Internal Revenue Service for \$34,398.62, the third paragraph of which letter states:

"The United States is entitled to priority of payment of these claims by reason of Federal Statute 31 USC, 191. 31 USC, 919, makes the assignee for the benefit of creditors personally responsible to the United States if he fails to pay the debts of the United States before paying other creditors."

(Testimony of Paul C. Keeton.)

Q. Now, do you say that you and he, you and Mr. Defenbach, were aware of this letter?

A. Yes, I made that copy in my office. [66]

Q. You made that copy. Now, did you advise—or put it this way: You never felt that anything in the revenue laws was going to preclude you from paying reasonable costs of administering the estate before paying the government?

A. I didn't know the answer to that.

Q. Well, you did read the letter. It was a warning not to pay other creditors; there was no warning you ever received from the United States Government or anybody else advising that you couldn't pay reasonable and necessary costs of administration, did you?

A. No, not in those words, no.

Q. Very well. And you knew, of course, and always expected, that there would be some money available for the payment of attorney fees in this action, didn't you?

A. No, I didn't know that there would be any available.

Q. Didn't you expect to get a flat fee, some kind of a flat fee, for the conduct of this litigation regardless of the outcome?

A. Not if the government took all the money under the tax liens, I sure didn't. -

Q. Of course not, of course if they took ahead of you. I am talking about your frame of mind, didn't you always expect you would receive a flat fee for the trial of this case? [67]

(Testimony of Paul C. Keeton.)

Mr. McKevitt: From whom?

Mr. Malott: Out of the funds of the estate.

A. No, I didn't.

Q. (By Mr. Malott): You did not?

A. No. I hoped that that was true. If the big case was lost, yes, I hoped it was true.

Q. If the big case was lost, you hoped to still collect out of the estate, didn't you?

A. If the government didn't take it all.

Q. Well, but I mean you expected that your claim for attorney fees in fighting this big case would take precedence over the government's tax liens?

A. I didn't think it would.

Q. Didn't think it would. But you were going to try that, weren't you?

A. Well, I never came to that, I never got to that juncture.

Q. All right. I just ask you categorically if you didn't know—well, I have asked you that.

Now, with reference to actual trial of the lawsuit itself, there were no substantial disputes over the facts in the case, were there?

A. Yes, I would say there were some very substantial disputes over the facts in the case. [68]

Q. And the case ended up as a mixed question of law and fact?

A. I would say it ended up more as a question of law, Mr. Malott, than a question of fact, as it ended up.

Q. You and his Honor are much more familiar with this case than I am, but could you tell us

(Testimony of Paul C. Keeton.)

where the factual disputes arose, where the case turned on questions of fact, of disputed questions of fact?

A. Well, the case turned on the priority of the claims of the various people involved in the case. In other words, one person claimed a priority because of the payment of part of the insurance premiums.

Q. I understand that, yes.

A. Another person in the case claimed a priority on account of being the ex-wife. Whether she intended to say the divorce was no good or not, we didn't know until the case was tried. The other parts of the case hinged on whether the so-called Stanfill Trust took precedence over the so-called Defenbach Trust.

Q. Perhaps you don't understand my question, Mr. Keeton. My question is where did the case turn on disputed questions of fact? I think you are telling me questions of law.

A. Well, in his Honor's decision, I think it hinged on a question of law. [69]

Q. That is what I meant, yes.

A. But we couldn't depend on that when we tried it.

Q. All right. And——

The Court: It runs in my mind—may I ask this question: Weren't there a good deal of background facts there which, we'll say at least, weren't admitted tending to show the intention of the trust settlor with reference to these vital documents?

(Testimony of Paul C. Keeton.)

A. There was.

The Court: All right, go ahead.

Q. (By Mr. Malott): And you tell this conversation with Mr. Etter the night before the case was tried, that you said you had a letter in your pocket relative to the payment of fees, and did you show him the letter? A. Mr. Defenbach?

Q. Yes.

A. No, he said it would do no good.

Q. Yes. And didn't he tell you at that time, in substance, that "We are not going to talk on any different basis than we have talked all the way through. We have had this agreement all the way through that we will wait until the end of the termination of this entire transaction, and thereupon you and I will both determine what fees should be requested and we will submit the matter to the creditors committee under the [70] assignment of November 16, 1954"?

A. No, he did not. He told me that he had no authority to make any agreement, the way he felt about it.

Q. And I think earlier you said on direct examination he had no objection to that type of agreement, but that he could not agree to it?

A. Yes.

Q. Would not agree to it?

A. In substance, that was it.

Q. Yes, neither could nor would agree to it?

A. And did not.

(Testimony of Paul C. Keeton.)

Q. And did not. Now, after that, did you make any written demands upon him for fee?

A. Yes. You have them in your file.

Q. I have Mr. Etter's letters, but——

A. No, I made no demands.

Q. Mr. Etter made all written demands?

A. Right.

Q. So you went to trial in the case, and did you ever ask Mr. Defenbach for reimbursement of your personal expenses in the conduct of this litigation?

A. No, I did not. After the trial was over, I never did ask him for any reimbursement. He offered at one time to pay Mr. Etter's expenses in the case, and that would have been about the 1st of March of 1956. [71]

Mr. McKevitt: Of what year? '56?

A. Yes.

Q. (By Mr. Malott): Do you have your office copy of your letter of June 6, 1956, carbon copy? If you do not have the original of that, I have got a copy of it?

A. Oh, yes. Do I have my office copy?

Q. Or your carbon copy of that letter?

A. Sure.

Mr. Malott: Well, if there is no objection, I will offer that as a true copy of the original and anybody can correct it.

The Witness: No objection.

Mr. McKevitt: No objection.

The Court: That will be Respondent's Exhibit 1, then?

(Testimony of Paul C. Keeton.)

The Clerk: Yes, your Honor.

The Court: It is admitted.

(Whereupon, the said letter was admitted in evidence as Respondent's Exhibit D.)

[See pages 131-135.]

Mr. Malott: Then the next is a series of correspondence; a letter of March 26 from Etter and Connelly to Paul Keeton; a letter of April 11, 1956 to Ralph Defenbach; a letter of April 13, 1956 from Mr. Etter to Mr. Paul Keeton; and a letter [72] of June 1, 1956 from Mr. Etter to Mr. Defenbach.

Is there any objection to any of those?

The Witness: Well, ask Mr. McKevitt. I have none.

Mr. McKevitt: I haven't seen them.

Mr. Malott: That is just a series of correspondence.

The Court: What is the purpose of this, Mr. Malott?

Mr. Malott: Demands for payment of fees.

The Court: Well, is there any question but what he demanded the fee?

Mr. Malott: Well, the amounts of the demands and the suggestions—

Mr. Etter: Attempts at compromise. You can put it all in if you want, I don't care.

The Court: You mean he offers to settle for less?

Mr. Malott: Yes, offers of settlement, put it.

(Testimony of Paul C. Keeton.)

The Court: All right, tack it all together and put it in as Respondent's E.

Mr. McKevitt: You say there is no objection to that?

Mr. Etter: No, not a bit.

Mr. McKevitt: All right. I just want the Court to know I am aware——

Mr. Malott: I am not asking counsel to be bound by anything that is an offer of compromise. I am not—— [73]

The Court: All right, it is in, go ahead.

(Whereupon, the said correspondence was admitted in evidence as Respondent's Exhibit E.)

[See pages 135-144.]

Mr. McKevitt: I just wanted the Court and Mr. Etter to know that I had in mind no offer of compromise has any probative value of anything.

The Court: The Court has that in mind, of course.

Do you propose to cross examine this witness on offers that Mr. Etter made?

Mr. Malott: No, your Honor, but included in this are——

The Court: Is there some correspondence from this witness?

Mr. Malott: No, the other——

The Court: Well, let's keep on the track, for heaven's sake. It is 4:30 now and don't throw anything in here that isn't material.

Go ahead.

(Testimony of Paul C. Keeton.)

Mr. Malott: Very well, I have no further questions.

Mr. McKevitt: I overlooked one or two questions.

Redirect Examination

Q. (By Mr. McKevitt): With reference to the time spent in legal research and [74] preparation of briefs prior to trial, and there was a memorandum brief submitted to Judge Driver that is in the file, is it not? A. Yes, it is.

Q. And can you approximate the number of hours that you put in in legal research in preparation?

A. After Judge Driver had heard the case, he asked for written briefs and I stayed up at Mr. Etter's house for five days while we worked full time on the brief, and then I came back for three more days while we both of us worked full time in preparing the brief, and I would say that we put in 100 hours or more in preparation of the brief.

Mr. McKevitt: That is all.

The Court: Mr. Malott.

Mr. Malott: Yes, I would like to ask him a question. I don't—

The Court: Well, go ahead.

Recross Examination

Q. (By Mr. Malott): This 100 hours of briefing, now what were the phases involved of wherein you spent such? That is the equivalent of—what did you figure a work week, 35 hour work week?

(Testimony of Paul C. Keeton.)

A. We worked a lot at nights, too. [75]

Q. 100 hours? What particular phases of the briefing?

A. We looked through the trust law day and day out, through the West indexes and through all the other indexes to find really the important case that this whole litigation hinged on, and finally at the end found it under some place where we never expected to look under—insurance—and we really spent all that time trying to find a case relevant and close to this one to submit to the Judge in our brief. If we had found the case first, it would not have taken us so long, but we found the case last.

Q. Then when you briefed the question under the subject of insurance and the assignability of insurance—

A. Finally found it there, and then were able to prepare the brief in about one more day by looking through there.

Q. When was that you were up there five days solid, Mr. Keeton?

A. Well, it would be right after October 18th.

Q. Did you stay in the hotel?

A. No, I stayed at Max's house.

Q. Oh, I see.

The Court: Is that all?

Mr. Malott: I have no further questions.

The Court: Any other questions? [76]

Mr. McKevitt: No, your Honor.

The Court: All right. Mr. Etter.

Mr. McKevitt: This examination of Mr. Etter won't exceed five minutes.

The Court: All right, go ahead.

R. MAX ETTER

a petitioner herein, called and sworn as a witness on his own behalf, was examined and testified as follows:

Direct Examination

Q. (By Mr. McKevitt): Your name is R. Max Etter and you are one of the petitioners in this case? A. That is correct.

Q. Admitted to practice in the State of Washington in the Federal Courts?

A. That is correct.

Q. Circuit Court of Appeals?

A. That is correct.

Q. Practicing how long?

A. About 21 years this year.

Q. Have had extensive experience in trial work in State and Federal Courts? A. Yes, sir.

Q. Appellate procedures in State and Federal Courts? [77] A. That is correct.

Q. You were at one time Assistant United States Attorney? A. Right.

The Court: I won't hold that against him.

Q. (By Mr. McKevitt): And Deputy Prosecuting Attorney? A. That is correct.

Q. Now, Mr. Etter, I want to ask you this one question particularly with reference to this conversation that Mr. Keeton spoke about in Spokane where the three of you were present and the fee

(Testimony of R. Max Etter.)

discussion was had. Will you tell the Court what took place in your recollection?

A. As close as I can remember—I talked with Mr. Malott at the recess—there is probably some question as to whether the conversation took place in the Ridpath or in my office or partly in both, and, as I recall, we discussed the case both places, over in my office and later when we went over to the Ridpath Hotel. The three of us were together at every time, so I would say that the discussion was either in the office or in the hotel or half in one and half in the other, as I recollect it.

I had talked, I think, with Mr. Defenbach at one time before. I just think that, although I may be in error. It might be that I corresponded with him through Mr. Keeton, I'm not sure of that, but [78] the definite one that I remember is the day prior to trial when we had a discussion about fees.

Q. The contents of that was what?

A. Beg your pardon?

Q. Give us that discussion.

A. Mr. Keeton came over and told me—I had asked Mr. Keeton to get some arrangement with Mr. Defenbach and I told him that I should like to have it on at least a partly retainer basis. Mr. Keeton came over and told me he had talked with Mr. Defenbach about it and hadn't reached any agreement and would I talk to Mr. Defenbach, or they both came over together, but in any event I had made a proposal on fees before and I repeated generally to Mr. Defenbach. I had suggested if

(Testimony of R. Max Etter.)

he wanted us to try this case, take it up on through appeal, that if he was willing to pay a retainer of \$2,000, it would be acceptable through the courts on a prescribed fee of 20 or 30 per cent.

And he said that he was unable to pay any retainer at all, and during the course of the conversation we discussed the matter of retainers, and I said it was a practice, at least in Spokane as I understood it, to provide for a retainer in possibly three different grades; one of 25 per cent, one of 30 and one of 40. I explained to him our practice here on contingent [79] fees; that if there were advance payments made for costs and probably was settled without litigation, it would be 25 per cent, unless there was some provision made for some type of a retainer.

Mr. Defenbach explained to me that he wouldn't be able to pay anything, then or on appeal. In fact when I questioned him, he told me that if we should lose or if there was some necessity for appellate procedure, that he still couldn't pay anything and that it would be incumbent on the attorneys to assume all of the costs of the litigation and the costs of the appeal and all of the rest of it, which I knew to be in a considerable amount, assuming we had to go to the Appellate Court in San Francisco.

I didn't care for that arrangement, I'll be frank to say, and I said so, but I told him that as long as we were in the case, we would try it out on that basis. When I explained to him what these

Testimony of R. Max Etter.)

matters of contingency were, he said as far as the proposals were concerned, they were reasonable, but that he could not agree to them and that was that.

That was just about the situation. There was no objection. He didn't say, as Mr. Keeton said, exactly that he had no objection; he said as far as he was concerned, that appeared to be a reasonable basis, but [80] he was unable to agree to pay anything, that we would just have to take it and catch as catch can, as a matter of fact, and if we lost in the lower court and we wanted to go to the appellate Court, that was up to us.

Q. You are speaking now about these percentage proposals?

A. That is correct, that is correct.

Q. Do I understand it is your testimony that he said he could see nothing objectionable to them?

A. That is substantially it.

Q. He considered it a reasonable fee under ordinary circumstances?

A. I shouldn't say I assumed it, but he had no objection and, in fact, we had a very pleasant conversation. He made his position clear that he couldn't pay and, although I was disappointed—I hate to take a case on that type arrangement—we agreed that we would do it, that was it.

Q. Was it your feeling at that time from your knowledge of the whole situation that unless there was a successful outcome to this suit here and above, that you and Mr. Keeton would be out your time and out of pocket?

(Testimony of R. Max Etter.)

A. Absolutely. And I might say this, and this is something that hasn't been mentioned, I had gone over upon the request of Mr. Keeton, I was told, evolved from a [81] request from Mr. Defenbach to talk to Clyde Rowan, one of opposing counsel, about a prospective settlement of the litigation and I had gone over to Mr. Rowan just a few days before this case and talked to him on a basis of possible settlement of this litigation, proposing or asking if he would consider somewhere between fifteen and twenty thousand dollars to his clients with the balance and remainder over to Mr. Defenbach, and Mr. Rowan told me that he would make a proposition to me, that he would give us between fifteen and twenty and he would keep the 46,000 and that was the best he would do, and which I conveyed back to Mr. Keeton and I assume he conveyed it back to Mr. Defenbach, and that was the posture of it when we had this discussion.

Q. In addition to the time spent in the actual trial of the case, Max, can you estimate for us the time that you personally put in in legal research that was required in various phases of this litigation?

A. There was a considerable amount of it, Mr. McKevitt. My docket probably illustrates, if you could just take it and look at it, the different work that was done in the pleadings. I am not going into that because his Honor wants to get around. But the problem here, I mean the actual crux upon which this case turned, [82] wasn't argument a

Testimony of R. Max Etter.)

the time of the case at all, neither the opposition nor we had, and I worked on it all that week with Mr. Keeton and he went down to Idaho on other work and I had found no solution to it at all. I hired the West Publishing Company, who provide a service, and set up the facts in this case and asked them if they could advise us of any leading cases or cases that had recently come into the publishing company that would bear on this subject. I received a telegram back from the West Publishing Company citing the same cases that I had found that were on the trust end of it and that were on the matter of will construction, I think it was, and other matters of that kind, with a later letter from them also on phases of it that were not determinative of the controversy, and I wasn't satisfied and I felt that the Court was not satisfied in his own mind during the argument as to how this case could be disposed of, and I was convinced that unless we had something that was pretty definite, in view of the situation we had where a trustee was trying to get \$66,000 for a bunch of creditors and two youngsters were on the other side, if we didn't have something definite, we weren't going to get any money in the situation that presented itself.

Q. As against the two youngsters, the two children? [83]

A. That is correct. The two children, I mean in a situation like that, it would seem to me we would have to be very definite, properly so, to get a judgment in a case like that.

(Testimony of R. Max Etter.)

So, finally, in going through the research, Mr. McKevitt, I went into insurance, and after being into the insurance for about, oh, 20 or 30 minutes, I came on to the case of Massachusetts vs. California Bank, I think in 187 Washington, which adopted a rule, by the way, which is considerably different than the rule that applies in New Jersey and some of the Eastern states. It is the contrary rule, although it is the majority rule, and we had had cases, I had found cases that looked bad for us because they took an opposite viewpoint from the right——

Q. Did you call those to Judge Driver's attention?

A. No, I didn't, I just called our own.

Q. Calling your own to the attention, you mean the 187 Washington, I assume?

A. That is correct.

Q. I assume you had in mind this Erie vs Tompkins?

A. That is correct, exactly right, because state law governs, jurisdiction having been established, so then it became an easy matter to wind up in the afternoon, get it dictated and sent to Judge Driver. We had [84] spent eight days and sent it the 9th day, or something like that. That was the conclusion of the work.

Q. Do you have an opinion, Mr. Etter, as to what a reasonable——

A. We later then submitted that to other coun

(Testimony of R. Max Etter.)

sel and let them use it, and the Appellate Court decided on the same case.

Q. You submitted it to the firm that took this case up? A. Oh, yes, we cooperated.

Q. The result of your labors?

A. That's right.

Q. Do you have an opinion as to the reasonable value of your services?

A. I feel the reasonable value was certainly 25 per cent of the recovery under those circumstances, yes.

Mr. McKevitt: You may examine.

Cross Examination

Q. (By Mr. Malott): Mr. Etter, in your letter of March 26th, part of Exhibit E, that was the first letter you had ever written to Mr. Defenbach on the matter of expressing an opinion—first, no, pardon me, that is the letter to Mr. Keeton.

A. That's right. [85]

Q. Was a copy of that sent to Mr. Defenbach?

A. Mr. Keeton advised me that he sent a copy of it to Mr. Defenbach.

Q. I see. And in that letter of the 26th, you make the expression, "It was your understanding that inasmuch as this case was taken on a contingent basis, that 20 per cent of the recovery was not excessive and was, in fact, an agreeable amount?"

A. Uh-huh.

Q. Now I ask, that wasn't by way of compromise, was it, that wasn't an offer of compromise;

(Testimony of R. Max Etter.)

that was an expression of your opinion of the reasonable amount at the time?

A. That and I think a reiteration of our original conversations that are indicated in my file of 20, 25, 30, 40 per cent, to him.

Q. Very well. And then you go on and ask that half of the 20 per cent now recovered, or about 6,000, be paid? A. That's right.

Q. Now, then, of course, in the same letter you suggested a definite—tried to button it up and asked for a definite agreement if you were to continue in the case? A. That's right. [86]

Q. And you were never able to reach—

A. Never able to reach an agreement, no.

Q. I believe you stated on your direct examination that was always your understanding, you would not be paid anything unless you won the case?

A. That's right.

Q. But I draw your attention to your letter of June 1st to Mr. Defenbach, just asking you to refresh your recollection; copy of your letter of April 13, 1956, I am drawing your attention to that, copy of which was sent to Mr. Defenbach and in part in which again you are writing on the subject of getting this fee matter straightened out, in which you say in part:

“It was my understanding that, in any event, we were to be paid a flat fee for this litigation; that is, the first Sun Life cases and the Macabees case.”

A. Yes.

(Testimony of R. Max Etter.)

Q. Doesn't that bring anything to mind on the thing?

A. It brings to mind a flat fee basis on his arrangement, that what we were doing was a reasonable fee. There was no guarantee of any money at all. I think you can read later there that I think the flat guarantee to which we should be entitled in the fees should be \$3,750. He hadn't guaranteed is anything, that is why I wrote the letter. [87]

Q. I ask you, in saying this, you say in part: "It was my understanding that, in any event, we were to get a flat fee."

A. By way of a contingent basis, exactly. We were never guaranteed one penny.

Q. By flat fee, you didn't mean contingent fee?

A. I was referring there to his arrangement. He thought it was agreeable, he never agreed to pay anything.

Q. All right.

A. Later on, counsel who he employed took that same position with me, that he had never agreed to pay us a cent.

Q. (Reading): "I think that the flat guarantee to which we should be entitled for these cases and on the appeal should be \$3,750, plus costs and expenses."

A. That's right, that is what I said. That is what I said. Doesn't say there that he had agreed to pay it.

Q. Oh, no. A. No.

(Testimony of R. Max Etter.)

Q. But you say it is your understanding that you would get a flat fee in any event.

Mr. Keeton: Win, lose, or draw. [88]

A. No, there was no understanding of that kind. If you construe it that way, you may do so, but there wasn't.

Q. I am just asking what you meant?

A. No, there wasn't—

Mr. McKevitt: May I inquire, if your Honor please, if this line of examination is being conducted for the purpose of showing that there had been a contract arrangement between these men and Defenbach?

Mr. Malott: Apparently, yes, I think that may well be. I am trying to find out what the agreement is. This is cross examination.

The Court: Is it your position that there was a contract for a flat fee?

Mr. Malott: No, your Honor, just taking the position that there was always an agreement, understanding made with Mr. Keeton that there would be a fee paid at the conclusion of the case, wait until they saw what had happened and then fix it accordingly.

Mr. McKevitt: I want to be clear if he is relying on these letters as constituting a contract. I am not clear on it, but if he is, I would object on the ground he hasn't pleaded it in his answer.

The Court: I don't think he is relying on a contract.

Mr. Malott: Thus far, Mr. McKevitt, I was just

Testimony of R. Max Etter.)

[89] cross examining, I haven't put on my own case.

The Witness: You see, Mr. Malott, I never received any answer to any of these letters to Mr. Defenbach. He never answered me at all.

Mr. Malott: I realize that.

The Court: Just a moment. I think I better conclude with these criminal cases that I have here. At least somebody ought to get some sleep tonight.

(A recess was taken in the hearing of the instant matter, after which the following proceedings were had:)

The Court: All right, proceed.

Mr. Etter: Are you going to be here tomorrow, Judge?

The Court: Yes, for a while.

Mr. McKevitt: Mr. Ware, will you be sworn, please?

MARCUS J. WARE

called and sworn as a witness on behalf of the petitioners, was examined and testified as follows:

Mr. McKevitt: Mr. Ware, of the Idaho Bar, our Honor.

The Court: Yes, all right.

Mr. McKevitt: And he has already read this hypothetical question, I have given a copy of it [90] to Mr. Malott, he has read it, so has Mr. Smith, and your Honor has a copy.

Mr. Malott: Are you filing a copy?

Mr. McKevitt: I have given the Court a copy.

(Testimony of Marcus J. Ware.)

The Court: Yes. Is that acceptable to you, Mr. Malott?

Mr. Malott: Yes, that is acceptable.

The Court: Have you seen it?

Mr. Malott: Yes, I have, and I am not objecting to the question. Of course, I am not admitting that all of the foundation elements have been established, but the form of the question, no objection.

The Court: Very well.

Direct Examination

Q. (By Mr. McKevitt): Mr. Ware, how old are you? A. 52.

Q. You reside where?

A. Lewiston, Idaho.

Q. And you are a member of the bar of Idaho?

A. Yes, sir.

Q. Admitted to practice when?

A. June, 1927.

Q. Have you practiced in the State and Federal [91] courts in Idaho and the State courts in Washington? A. Yes, sir.

Q. General practice?

A. That is correct, general practice.

Q. Trial work, appellate work?

A. Yes, sir.

Q. Mr. Ware, have you been an officer of any bar associations down in Idaho?

A. Oh, originally when we had a county bar association and later of the Clearwater Bar Assoc

Testimony of Marcus J. Ware.)

ation that consisted of five north central Idaho counties.

Q. Now, I have discussed this case with you and Mr. Keeton and Mr. Etter have also discussed it with you, have they not, this litigation?

A. Yes, in a general way, yes.

Q. And I have submitted to you a hypothetical question which I presented to his Honor and you have read that?

A. Yes, I have read that hypothetical question. (The following is the hypothetical question referred to hereinbefore:

“Q. Mr., have you been in court during the testimony that was given by Mr. Paul Keeton and Mr. Max Etter? In connection with the testimony given by those gentlemen, will you please assume the following facts to be true: [92]

Immediately prior to September 23, 1953 one Robert F. Weyen resided in Clarkston, Washington, and for a considerable period of time prior to said date had been engaged in logging business. He was a married man. His wife's name was Mary Weyen and as their issue two children, Caroline and Daryl Weyen. On September 23, 1953, Robert F. Weyen procured a decree of absolute divorce from his wife, Mary Weyen, in Asotin County, Washington. On that same date, he executed his last will and testament. A copy of said will is a part of the records and files in this court in Cause No. 1309. In that will, he made no provision for his children because, as he recited therein,

(Testimony of Marcus J. Ware.)

he had provided for them through insurance policies on his life. There was a further provision that if said policies lapsed or become void, the children were to receive \$10,000.00 share and share alike. The residue of his estate, he bequeathed to one Emilie Mullins.

Contemporaneous with the execution of said will and on the 23rd day of September, 1953, [93] Robert Weyen executed a trust agreement, which agreement is a part of the files and records in Cause No. 1309. In this trust agreement, he designated E. J. Stanfill, an attorney at Clarkston, Washington, as trustee and as beneficiary in several life insurance policies on the life of the said Robert Weyen and issued by the Sun Life Assurance Company of Canada. The aggregate amount of said policies was \$60,302.94, with double indemnity provisions in the event of accidental death. There were also two life insurance policies on his life with the Macabees Insurance Company in the aggregate sum of \$5,832.00, which contained provisions for double indemnity in the event of accidental death. That among other things, said trust agreement of September 23, 1953, contained the following provision:

‘The donor (Weyen) specifically reserves the right during the term of this trust to pledge any of such policies as collateral or to exercise the loan rights as provided in said policies and in the event the donor makes [94] application for such loans, it is hereby expressly understood that the signatur

(Testimony of Marcus J. Ware.)

of the trustee named herein shall not be required to join in the application for said loans.'

On the 16th day of November, 1954, Robert Weyen executed a document entitled 'Assignment to Trustee for Benefit of Creditors,' which document is a part of the files and records in Cause No. 1309. In said instrument, the defendant in this action, Ralph B. Defenbach, was designated as 'trustee'. This assignment contained, among other things, the following provision:

'The Party of the First Part has the following policies of life insurance, to-wit:

Policy No. 1937383 — The Macabees, Detroit, Mich.—\$3,000.00; 1852251—Sun Life Assurance Co. of Canada—\$2,000.00; 1952847—Sun Life Assurance Co. of Canada—\$5,000.00; 1710519—Sun Life Assurance Co. of Canada—\$1,000.00; 1919863—Sun Life Assurance Co. of Canada—\$3,000.00; 1755413—Sun Life Assurance Co. of Canada—\$1,000.00; 1861701—Sun Life Assurance Co. of Canada—[95] \$10,000.00; 1861700 — Sun Life Assurance Co. of Canada—\$10,000.00; OW-OON50387247M—Mutual Benefit H&A Assn., Omaha—\$2,500.00; PPA 100-950352M—Mutual Benefit H&A Assn., Omaha—\$5,000.00.

'That the said Party of the First Part, at the time of executing this assignment, has prepared the necessary documents to have Party of the Second Part herein made his beneficiary for the benefit of the creditors joining in this assignment in the event of his death; and Party of the First Part shall

(Testimony of Marcus J. Ware.)

immediately deliver said policies of life insurance to Party of the Second Part for forwarding to the Home Offices of the companies issuing said policies so that appropriate endorsements may be attached thereto showing Party of the Second Part as beneficiary under the terms of said policies.'

Prior to September 23, 1953 (the date of the execution of what we will call 'the Stanfill trust'), Robert Weyen had [96] suffered numerous and serious financial reverses in his logging business. His financial condition grew steadily worse. The federal government and the State of Idaho had filed tax liens against him on the following dates: two on September 30, 1954; one July 16, 1954; one December 22, 1954; one April 6, 1955; one May 13, 1955; and one August 24, 1955; and one February 10, 1956. That said tax liens totaled \$38,318.38.

The serious financial condition of Robert Weyen resulted in the execution of the assignment for the benefit of creditors dated November 16, 1954.

Robert Weyen came to his death accidentally on April 16, 1955. At that time, the defendant in this action as trustee had in his possession little, if any, assets for distribution to the creditors of Robert Weyen, secured and unsecured, the amount of his indebtedness to them approximating the sum of \$225,000.00, except for the right, if any, of Mr. Defenbach, as trustee, to recover for the benefit of said creditors the proceeds [97] of the insurance policies already referred to.

(Testimony of Marcus J. Ware.)

Immediately following the death of Robert Weyen, his Mother legally contested the rights of Ralph B. Defenbach, as trustee, to a portion of the proceeds of said policies; his ex-wife, Mary Weyen, similarly contested the right of Mr. Defenbach to any of the proceeds of the insurance policies; the children of Robert F. Weyen, through legal representation, contested the right of Ralph B. Defenbach to the proceeds of said policies; the several claims of these parties referred specifically to amounts due under policies of life insurance with double indemnity from Sun Life Assurance Company of Canada and the Macabees Insurance Company. Parenthetically and with reference to two accident policies for accidental death issued to Robert F. Weyen by the Mutual Benefit Association of Omaha, totalling \$7500.00, which are not actually in issue in this case, nevertheless through the efforts of Attorney Paul C. Keeton, one of the petitioners in this case, said amounts on said 98] policies were paid to the defendant, Ralph B. Defenbach as trustee. In connection with this specific sum of \$7500.00, the defendant, Ralph B. Defenbach, refused to pay out any moneys from said fund for any purpose until and if and when his rights as trustee thereto were legally established. It was the opinion of said trustee, Ralph B. Defenbach, concurred in by petitioner Paul C. Keeton, that said sum of \$7500.00 was subject to the taxes which have heretofore been referred to, and in addition that the Federal Government under Para-

(Testimony of Marcus J. Ware.)

graph 7, Part B, of the Trust Agreement of November 16, 1954, was second in priority to payment of labor liens and that, therefore, any balance of funds in his hands would be subject to the claims of the Tax Departments of the United States Government and the State of Idaho.

That because of the conflicting claims above referred to, the Sun Life Assurance Company of Canada and the Macabees Insurance Company caused to be filed in the above-entitled Court separate actions in interpleader wherein the following parties were [99] joined as defendants:

Mary Weyen (ex-wife)

Elfrieda May (Mother)

E. J. Stanfill as Trustee for the minor children of the deceased, Robert F. Weyen

Ralph B. Defenbach as Trustee for the creditors (under Assignment to Trustee for Benefit of Creditors, dated November 16, 1954).

The action instituted by the Sun Life Assurance Company was first filed; the action filed by the Macabees was filed thereafter.

That defendant trustee, Ralph B. Defenbach, consulted with and retained petitioner Paul C. Keeton to represent him in the litigation just mentioned.

That said petitioner, Paul C. Keeton, informed defendant Ralph B. Defenbach that since said actions were pending in the Federal Court in the State of Washington that it would be necessary for said petitioner, Paul C. Keeton, to associate with

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him an attorney having an office in the District wherein said action was pending; such advice being given by petitioner, Paul C. Keeton, to Ralph B. Defenbach, Trustee, pursuant to Rules of the District Court of [100] the United States for the Eastern District of Washington, being subdivision (g) of Rule 1 thereof, reading as follows:

‘(g) Office Address within the State—Should a party in any cause not appear in person, and should his attorney not maintain an office within this State, there shall be joined of record in such appearance, or within ten (10) days thereafter, an associate attorney having an office in this district and admitted to practice in this court.’

Petitioner, Paul C. Keeton, advised defendant Ralph B. Defenbach that because of the importance of such litigation it was not only necessary that there be a formal compliance with said rule, but that in order that the interests of the defendant Ralph B. Defenbach, Trustee, be properly protected there be associated in said case a reputable and experienced Spokane trial lawyer, familiar with Federal Court procedure in the Ninth Circuit. To this recommendation on the part [101] of petitioner, Paul C. Keeton, the defendant Ralph B. Defenbach agreed.

That the litigation above referred to involved the filing of pleadings such as motions, stipulations, answers and other documents as listed in the files and records of this Court.

That in the interpleader actions instituted by the

(Testimony of Marcus J. Ware.)

Sun Life Assurance Company of Canada and the Macabees Insurance Company, said plaintiffs were represented by Messrs. Graves, Kizer, Greenough & Gaiser, of Spokane, Washington; S. Dean Arnold Attorney at Clarkston, Washington, appeared as attorney for the defendants, Mary P. Weyen, individually and as Guardian of Daryl Weyen and Carolyn Weyen, minors, and E. J. Stanfill, a Trustee and E. J. Stanfill, as Executor of the Estate of Robert Francis Weyen, Deceased; C. C. Rowan, of Spokane, Washington, appeared as attorney for defendant, Elfrieda May.

That each of the defendants in said interpleader actions claimed a part and/or all of the proceeds of the said life insurance [102] policies which have been deposited by said insurance companies into the registry of the above entitled Court.

That immediately following the death of the said Robert F. Weyen, the Internal Revenue Department of the Federal Government had advised the defendant, Ralph B. Defenbach, that it intended to audit the income tax of Robert F. Weyen for a period of several years prior to said death and had ordered impounded all of his records. That the said Ralph B. Defenbach rented an office in the Porter Block in Lewiston, Idaho, on or about May 1, 1955, being the same building occupied by the petitioner, Paul C. Keeton, in which office were placed all of the records of the deceased, Robert F. Weyen, which might pertain to or have an bearing upon the tax obligations, if any, of Robert

Testimony of Marcus J. Ware.)

1. Weyen; that at all times from the inception of the actions instituted by the insurance companies the defendant, Ralph B. Defenbach, advised petitioner, Paul C. Keeton, that he did not feel that he was in any wise authorized or empowered to expend any part of the proceeds [103] of said life insurance policies which might come into his hands or for any purposes whatsoever until if and when the claims of the Federal Government, the State of Idaho and secured common creditors of said Robert F. Weyen have been in whole or in part satisfied. That it was fully understood by the defendant, Ralph B. Defenbach, that the compensation, if any, for his attorneys, Paul C. Keeton and R. Max Etter, and compensation for himself as trustee under the Assignment of November 16, 1954, would be completely dependent upon the outcome of the action above referred to, viz: that there would have to be a judgment of the above entitled court, final after a possible appeal in favor of the defendant, Ralph B. Defenbach as Trustee.

That in the proper representation of said defendant, Ralph B. Defenbach, in said action it was and became necessary for petitioners, Paul C. Keeton and R. Max Etter, to extensively brief the many complicated legal questions involved, among which was the contention of counsel representing the [104] other defendants that the provisions of the Trust Agreement of September 23, 1953, were irrepealable in nature, which position, if sustained, would result in the entire fund due out of the

(Testimony of Marcus J. Ware.)

proceeds of the said insurance policies being distributed among parties other than Ralph B. Defenbach as Trustee. The proper conduct of such litigation also involved numerous conferences between petitioners and defendant, Ralph B. Defenbach, the conduct of a great deal of correspondence, conferences in Spokane between Paul C. Keeton and R. Max Etter and Ralph B. Defenbach.

Said actions came on for trial before the Honorable Sam M. Driver, Judge of the above entitled Court on or about October 18, 1955. After reception of the evidence introduced by all the parties involved, written briefs on behalf of Ralph B. Defenbach were submitted by your petitioners and by opposing counsel. The legal research and preparation of said brief required petitioners to expend of their time at least 100 hours. The legal problem involved resolved itself [105] into a question of whether or not the Stanfill Trust of September 23, 1953, was irrevocable, thus placing any funds derived from said insurance policies beyond the power and control of Ralph B. Defenbach as Trustee for the benefit of creditors under Assignment to Trustee for Benefit of Creditors, dated November 16, 1954.

This legal question, through the efforts of petitioners, Paul C. Keeton and R. Max Etter, was resolved in favor of Ralph B. Defenbach by the Honorable Sam M. Driver, Judge of the above entitled Court, in a six-page opinion filed December 15, 1955.

(Testimony of Marcus J. Ware.)

Subsequent to the filing of said opinion and the entry of judgment thereon, E. J. Stanfill, as Trustee, and Elfrieda May, as appellants, perfected an appeal to the United States Court of Appeals for the Ninth Circuit, wherein defendant, Ralph B. Defenbach, as Trustee, was named as appellee.

Because of a dispute between Paul C. Keeton and R. Max Etter and Ralph B. Defenbach as to the compensation Paul C. Keeton and R. Max Etter were entitled to as the [106] result of their efforts in procuring the judgment above referred to in the total sum of \$66,134.94, Paul C. Keeton and R. Max Etter withdrew from further participation in the litigation and said appeal on behalf of Stanfill as Trustee and Elfrieda May was conducted by other attorneys.

The judgment of the District Court in favor of Ralph B. Defenbach as Trustee was affirmed by the Court of Appeals on January 4, 1957, and a study of that opinion clearly indicates that the Assignment to Trustee for Benefit of Creditors, dated November 16, 1954, and drawn by the petitioner, Paul C. Keeton, was in every respect a valid instrument, even though its validity had been severely attacked throughout the entire course of the litigation in both the District Court and the Court of Appeals.

Furthermore, the extensive legal research conducted by Paul C. Keeton and R. Max Etter in the District Court was turned over by said petitioners to Messrs. Paine, Lowe, Coffin & Herman

(Testimony of Marcus J. Ware.)

for their assistance in sustaining the judgment of the District Court. [107]

Do you have an opinion as to the reasonable value of the services rendered by Mr. Keeton and Mr. Etter?

What is that opinion?"

Q. (By Mr. McKevitt): Having in mind the testimony, and I assume you have been in court during the entire testimony of Mr. Keeton and Mr. Etter?

A. That is correct.

Q. Having in mind the testimony they have given in and in connection with the hypothetical question with which you are familiar, do you have an opinion as to what would be a reasonable fee to be allowed to these gentlemen for services rendered?

A. Yes, I have.

Q. Do you have such an opinion?

A. I have an opinion.

Q. Will you state what it is?

A. My opinion is that a reasonable fee would be one-third of the amount recovered.

Q. In arriving at that opinion, I will inquire if you had occasion to make a study of your own bar schedules, the bar schedule of Asotin County and the bar schedule of Spokane County? [108]

A. Yes, I am familiar with the bar schedules. Mr. McKevitt: You may inquire.

Cross Examination

Q. (By Mr. Malott): You say your idea is one-third of the amount recovered?

(Testimony of Marcus J. Ware.)

A. I am saying I would consider that a reasonable fee.

Q. What would be your notion of a reasonable fee in the matter if it were to be carried on to the Circuit Court of Appeals?

Mr. McKevitt: That is objected to as incompetent, immaterial, and irrelevant, because we didn't conduct the appeal.

The Court: Overruled, he may answer it.

Q. (By Mr. Malott): What would be your notion in the thing?

A. I would say a fee measured by 40 per cent of the amount recovered——

Q. Your breakdown——

A. ——in my opinion.

Q. Your breakdown, then, would be about \$22,000 contingent fee for the case in the lower court and about 7 per cent more, about \$4,500 more, contingent for covering the Circuit Court of Appeals?

A. Mr. Malott, you may be in a field that I should not [109] testify in. I have not had any connection with appeals to the Ninth Circuit Court of Appeals or any Circuit Federal Court, although I worked on one case years ago for an attorney in Lewiston in connection with that.

Q. You have got a pretty good experience in trials before District Courts, I mean?

A. Yes, sir, in my own state and some in certain Washington counties, and appellate work in Washington and in conjunction with Washington lawyers.

(Testimony of Marcus J. Ware.)

Q. Is it your opinion that all cases that are handled on a contingent basis should be handled on a basis of one-third for the trial in the lower court?

A. I consider such a reasonable fee.

Q. Irrespective of the question, whether it turns on questions of fact or of law, for the time involved in the trial?

A. I think it would depend upon the nature and substance of the action and the disputed nature of the controversy and the problems involved, and I might say in arriving at my opinion I have considered—I am familiar with the pleadings in the cases and the decision of the Court, the briefs filed. I have examined them.

Q. You are aware of the fact and you are of the opinion that the case turned virtually exclusively on questions [110] of law, rather than fact, are you not?

A. Except that to the extent that facts were background in the interpretation of the instruments involved——

Q. Yes.

A. ——which would involve the presentation of a factual question, I suppose, from the standpoint of parties on both sides of the controversy.

Q. Now may I ask you this: If we can assume in this case that the trustee, the respondent here, had around \$7,000 or \$7,500 which would have been available for expenses of litigation, and that there was no specific agreement, I would ask in your

(Testimony of Marcus J. Ware.)

opinion what would be a reasonable fee under those circumstances?

A. I don't quite understand your question.

Q. Well, that was poorly expressed, let me just ask you this: Assuming that the client has available for conducting litigation \$2,500 or \$3,500, which he is willing to pay on account and may eventually be able to pay on account, what do you think would be a reasonable fee?

A. Are you speaking of before or after the trial?

Q. Well, he is a solvent client, is what I am saying. You have got a client that is solvent up to \$7,500; that he is solvent and has money on which to pay an attorney's fee; what would be a reasonable attorney's [111] fee to charge him on a case like that for trying these cases?

A. You are assuming facts that aren't in evidence here as far as this case at the present time.

Q. That is correct.

Mr. McKevitt: Well, I object to it as not being proper basis for assuming that. It contemplates facts that counsel might introduce in evidence which would probably make it proper cross examination.

A. It is difficult for me to answer it in the sense that so far there has been no indication that there were any free funds. It would look like the assumption of facts outside of the case.

Q. (By Mr. Malott): Will you endeavor to make an assumption, however?

(Testimony of Marcus J. Ware.)

A. You are talking about a flat fee?

Q. I am talking about a fee, a way to charge a client. You are trying a case and there is no agreement, there is no agreement whatsoever. We are apparently agreed on that. In this case, there was no agreement. You are assuming in your answer that there was no agreement.

A. I certainly wouldn't consider \$2,500 or \$3,500 adequate.

Q. Let me ask you this: You have assumed in this case [112] that there was no agreement for the payment of an attorney's fee, haven't you, in the answer to the hypothetical question?

A. In answering the hypothetical question, I have assumed that there was no agreement for a fixed or flat or prearranged fee; that the petitioners here, that the attorneys, were employed on a basis that if there was no recovery, there would be no fee and that they would be out their costs. That is as I understand the hypothetical question.

Q. That is the way I understand it.

A. Now I am asked, as I understand you—understand, I am not arguing—I am asked what would be a reasonable fee if a client had \$2,500 or \$3,500?

Q. Yes.

A. Available to pay toward attorney's fees?

Q. Yes.

A. Well, all I can say is I don't think that sum would be a reasonable sum.

Q. That is, as a retainer and how much more?

Testimony of Marcus J. Ware.)

If you had a cushion, a guarantee, that you would eventually receive a figure of \$2,500——

A. Now, would this \$2,500 cover costs or would costs——

Q. Let's call it \$2,000 plus costs of up to \$500 for the trial in the lower court. [113]

A. Oh, I would assume that a person would be entitled to an additional fee of equivalent to 15 or 20 per cent. I mean, a fee based on the amount of the recovery of some 15 or 20 per cent in addition to a retainer.

Q. In other words, if it is a \$60,000 recovery, you would say a retainer of \$2,000 plus nine to thirteen thousand dollars more, on a \$60,000 recovery? I am just rounding it out.

A. Well, I am not——

The Court: That is mathematical.

Mr. Malott: Yes, that is mathematical.

A. I am a poor accountant.

Mr. McKevitt: I can't follow that myself.

Mr. Malott: All right, I have no further questions.

Mr. McKevitt: That is all.

(Witness excused.)

The Court: Mr. Smith.

DEL CARY SMITH

called and sworn as a witness on behalf of the petitioners, was examined and testified as follows

Direct Examination

Q. (By Mr. McKevitt): Your name is Del Cary Smith, Jr.? [114] A. Del Cary Smith.

Q. You reside in Spokane?

A. I reside in Spokane and have all my life.

Q. Practicing attorney? A. I am.

Q. Admitted to practice when?

A. Over 30 years ago.

Q. Practice in the State and Federal Courts of Washington and Idaho both?

A. I am admitted to the Federal Courts of Washington, Idaho, California, and to the Circuit Court.

Q. Were you at one time a member of the Prosecutor's staff of Spokane County?

A. Yes, I succeeded Judge Driver when he went to Wenatchee. I won't say I took his place, I succeeded him.

Q. And in addition to that——

Mr. McKevitt: This is leading, Tom, but it is a fact——

Q. ——you have been President of the Spokane County Bar, the State Bar, and a member of the Board of Governors? A. That is true.

Q. You have read this hypothetical question?

A. I have read the hypothetical question and listened to the background of the case as detailed in the sworn testimony today. [115]

(Testimony of Del Cary Smith.)

Q. Do you have an opinion as to the reasonable value of the services rendered by Mr. Keeton and Mr. Etter? A. I have.

Q. What is it?

A. I would feel that they would be entitled to a fee of not less than 25 per cent for their services.

Mr. McKevitt: You may examine.

Mr. Malott: I have no questions.

(Witness excused.)

Mr. McKevitt: The petitioners rest, your Honor.

The Court: All right.

Mr. Malott: Mr. Defenbach.

RALPH B. DEFENBACH

defendant herein, called and sworn as a witness on his own behalf, was examined and testified as follows:

Direct Examination

Q. (By Mr. Malott): You reside where, Mr. Defenbach? A. Lewiston, Idaho.

Q. Your occupation?

A. Public accountant.

Q. How long have you been so engaged?

A. Oh, 30 years. [116]

Q. And during his lifetime you became assignee of this assignment for benefit of creditors dated November 16, 1954, did you not?

A. That is right.

Q. And following that time you served as such assignee during Mr. Weyen's lifetime?

A. Yes.

(Testimony of Ralph B. Defenbach.)

Q. And then he was killed in an automobile accident in April of '55, was he not?

A. April 16th.

Q. April 16, 1955, following which you continued as assignee for the benefit of creditors?

A. Yes.

Q. Now, you have heard Mr. Keeton's story of the circumstances of the assignment; that he was a logger and got tangled up in his operations and that you became assignee for the benefit of the creditors, and that there were about \$140,000 in one class of creditors and about \$60,000 of another class of creditors; is that substantially correct?

A. Yes, that is the best information I would have.

Q. Now, Mr. Defenbach, Mr. Keeton, as I understand it, had been Mr. Weyen's attorney during his lifetime? A. Off and on, yes.

Q. Off and on. Following that, when did you engage [117] Mr. Keeton as your attorney in this matter? I mean, as attorney after Mr. Weyen's death, did you employ Mr. Keeton?

A. Very shortly afterwards.

Q. Yes. And was there any discussion at that time regarding fee or compensation which he was to receive for his services and, if so, what was said?

A. Yes, there was a discussion at that time and a discussion several other times with respect to any fee that he might charge, any fee that I might charge.

(Testimony of Ralph B. Defenbach.)

Q. Will you fix the time and place where these discussions took place?

A. Oh, I couldn't—the first one was shortly after April 16, 1955. The other conversations were in Mr. Keeton's office. We were busily engaged in a great many details of this work. He agreed and I agreed, it was a mutual agreement, that we would impose no fees for ourselves until this entire matter was taken into the District Court in Nez Perce County and finally adjudged closed.

Q. Did you discuss the proposition that under this assignment, that you were going to wind it up or the final windup would be under court supervision or under court approval?

A. Yes, that was discussed. Mr. Keeton mentioned a [118] conference with certain attorneys and I am sure that the matter was discussed at that place and at that time. There were a great many questions as to whether the trustee would survive Mr. Weyen and as to whether the committee would survive Mr. Weyen, so all——

Q. By that you mean there was a question as to whether this agreement of November 16, 1954 would continue after Weyen's death?

A. That is right.

Q. Yes.

A. And the attorneys were the attorneys Mr. Keeton mentioned, Mr. Russell Randall, Mr. Paul Hyatt of Lewiston, and the conclusion was and the agreement was that——

Mr. McKevitt: I object to his stating what the

(Testimony of Ralph B. Defenbach.)

conclusion and agreement was. What was said by either——

The Court: Yes, I think that's right. What was said by the parties there?

A. Mr. Keeton said that on account of his knowledge of Mr. Weyen's affairs, he felt that he was competent to act as attorney in this trust and represent the trustee, and that if I would work in conjunction with this committee, that he thought this matter could be brought to a successful conclusion.

Mr. McKevitt: May I make an inquiry? Are you [119] talking about now about the discussions with Mr. Keeton prior to Mr. Weyen's death or after?

A. No, after his death.

Mr. McKevitt: After his death.

A. After his death.

Q. (By Mr. Malott): Did Mr. Keeton express any of the reasons why he was willing to go into such an arrangement? A. Yes.

Q. Why did he say he proposed to handle it in that fashion?

A. One reason was that he was thoroughly familiar with Mr. Weyen's affairs; that he felt a personal responsibility to Mr. Weyen in this matter; that he was the author of the instrument and felt responsibility in it and that he was also a creditor of the creditors' pool.

Q. He was a creditor? How big a creditor did he tell you he was?

A. My memory, he said \$5,000.

Testimony of Ralph B. Defenbach.)

Mr. Keeton: Oh.

A. He is recited as a creditor in the agreement here for nineteen hundred and some odd dollars.

Q. Following that you received this \$7,500 from the Mutual Benefit Health and Accident Association?

A. Yes. [120]

The Court: He received how much?

Mr. Malott: \$7,500, approximately \$7,500.

A. It was more than that, it was closer to \$8,700.

Q. \$8,700. Now, with reference to the tax liens that were claimed by the various taxing agencies, did you have conversations with the Director of Internal Revenue as to whether you could conduct litigation and make reasonable expenditures in prosecuting this litigation?

Mr. McKevitt: Objected to as hearsay. As I understand the discussions, oral discussions?

Mr. Malott: Oral discussions.

Mr. McKevitt: I object to that.

Mr. Malott: It can be answered yes or no, not what was said.

A. Not with the Director, with his representatives, yes.

Q. Prior to the time that this litigation was commenced, did you and Mr. Keeton discuss with each other as to whether you could make reasonable expenditures in conducting this litigation?

A. Yes.

Q. And what was said by you and Mr. Keeton as to whether expenditures could be made?

(Testimony of Ralph B. Defenbach.)

Mr. McKevitt: I wish you would fix the time and place. [121]

Q. (By Mr. Malott): Well, if you can fix the time and place as best you can.

A. Oh, May, June, July of 1955.

Q. What conclusion did you and Mr. Keeton come to as to whether that money, whether the \$8,500, could be used for expenses for administering the estate?

Mr. McKevitt: Object to the form of the question. Detail the conversation.

The Court: Yes, I think that calls for a conclusion as to what conclusion they came to. I will sustain the objection. Tell what was said, what discussion.

Q. (By Mr. Malott): What was said by you and Mr. Keeton?

A. Well, I told Mr. Keeton my opinion was that this money was practically dedicated to the purpose of protecting this estate.

Q. And at that time had you had conference with these lien claimants, these taxing—— At the time you made that statement, had you had conversations with the taxing agencies? A. Yes.

Q. And did you repeat to him what you had been told by the taxing agent, by the representatives of the Department of Internal Revenue?

A. I am quite certain that I did.

Q. What, in substance, did you tell him? [122]

A. I told him that I had talked with Mr. Ber

Testimony of Ralph B. Defenbach.)

Heath, who was the Collector of the Northern District of Idaho of Internal Revenue—

Mr. McKevitt: Heath?

A. Heath. That I told Mr. Heath that I had \$3,700 in round numbers on deposit in the bank; that I was conserving that money for administrative expenses of the trust, and asked him if his office had any intention of placing a lien on the money or preventing me from doing that. At first he said he was not qualified to give me an answer, so he contacted the attorney for the Internal Revenue Division in Boise and then reported back to me that while they didn't want to commit themselves to writing in the matter, that I could rest assured that they would not interfere with me, because they had a claim at stake and I was the only one that could protect their claim.

The Court: Is this all that you told Mr. Keeton what the Internal Revenue people told you?

A. Yes, I told him that.

The Court: You related this all to Mr. Keeton is just the words you are telling it to me now?

A. In substance, yes, your Honor.

The Court: All right.

Q. (By Mr. Malott): How many conferences did you have with [123] Mr. Collister, the attorney Collister?

A. Collister is the Deputy United States Attorney. I had probably—my best recollection is four, possibly five conferences with Mr. Heath and one conference with Mr. Collister.

(Testimony of Ralph B. Defenbach.)

The Court: These were all out of the presence of your attorney? Your attorney never went with you, Mr. Keeton, in any of these conferences?

A. That is right.

The Court: All right.

Q. (By Mr. Malott): And did you, in substance, *rely* to Mr. Keeton the conversations that you had—— A. Yes.

Q. ——with the tax man or the attorney?

A. Yes.

Q. Now, when was the first time you met Mr. Etter?

A. In his office at 9 o'clock in the morning on the day of this hearing. I think it was the 18th day of October, 1955.

Q. Did you talk about the merits of the case itself?

A. We discussed some matters with respect to my testimony and that is all.

Q. I see. Was there any discussion in your presence regarding fee? A. None. [124]

Q. Did Mr. Keeton on or about that time, or on or about the 18th of October, make any suggestion to you regarding what figure should be charged in this case, or these cases, I should say?

A. Mr. Keeton met me in the lobby of the Richmond Hotel on the morning of the hearing, approximately 7:30 in the morning, and we talked about a number of matters and then he said this he says, my best memory of it, "That we feel in this action that we should have a guarantee c

(Testimony of Ralph B. Defenbach.)

\$7,500, win, lose, or draw, and \$15,000 in case we win."

Q. What did you say to that?

A. And I said, "Well, Mr. Keeton, you know that I cannot make any such an agreement with you." I meant by that——

The Court: Well, I don't think the witness should explain what he meant by that. What he said, it is what he said, not what he meant, his secret mind.

Q. (By Mr. Malott): Was any reference made to prior fee arrangements you had?

A. As to prior——

Q. Well, I mean what else was said? Just finish the conversation if you can. Keeton said that he wanted \$7,500 base or a total of \$15,000 if he won, and you said you couldn't agree to that, and did you tell him why? [125]

A. My memory is that I said "My committee is not present."

Q. Did Mr. Etter on that day, at that time—— well, I have asked you that already. You have said he did not discuss fee?

A. He did not discuss fee.

Q. And when was the first time you heard from Mr. Etter on the subject of fees, by which I mean the first time——

A. These letters that are in evidence, on those dates.

Q. You refer to the letters of March——

(Testimony of Ralph B. Defenbach.)

The Court: Didn't you ask him what the conversation was?

Mr. Malott: I beg your pardon?

The Court: Didn't you ask him what was said by Mr. Etter?

Mr. McKevitt: Yes, he did.

Mr. Malott: No, I asked him when was the first time he ever heard from Mr. Etter.

The Court: Oh.

Mr. Malott: When was the first time he heard from Mr. Etter.

The Court: Well, show him the letters if it will refresh his memory.

A. Yes, those are the letters. [126]

Q. (By Mr. Malott): You have seen the letters which are in evidence as Respondent's E. Did you write any letters in reply to that? A. No.

Q. Did you write any letters to Mr. Keeton?

A. No.

Q. Did you talk to Mr. Keeton? A. Yes.

Q. Where did you have your conversations with Mr. Keeton? A. In his office.

Q. In Lewiston? A. Yes.

Mr. McKevitt: Fix the date of these conversations.

Mr. Malott: Yes, I am going to.

Q. Well, the first letter, I believe——

The Court: Well, what has the letter from Etter got to do with the date of his conversation with Mr. Keeton?

Mr. Malott: Following demand.

(Testimony of Ralph B. Defenbach.)

The Court: Beg pardon?

Mr. Malott: Following demand made by Mr. Etter.

The Court: I think the question now is the date of his conversation with Mr. Keeton as near as he remembers.

Mr. Malott: I am trying to get him to take it up with that date. [127]

The Court: Show him the letter, then, and let him refresh his memory.

Mr. Mallot: Very well, your Honor.

The Court: Don't read them, just look at them, if you can, and figure out when you talked to Mr. Keeton at his office in Lewiston.

A. On or about the 1st of April—on or about the 12th of April.

Mr. McKevitt: '56?

A. '56. And on or about the 3rd of June, 1956.

Q. (By Mr. Malott): What was said by Mr. Keeton at that time?

The Court: At which time? He has detailed three meetings.

Q. (By Mr. Malott): Yes, on or about the 1st of April?

A. I think all that I talked with Mr. Keeton about on the first meeting was that I felt that he should adhere to his agreement with me that he would not assess any fees with respect to his own services until this action was completed.

Q. Did you suggest to him that you make a

(Testimony of Ralph B. Defenbach.)

separate settlement with Mr. Etter for Mr. Etter's services?

A. Yes, I always figured that was his responsibility.

Q. I know——

Mr. McKevitt: Object to that, if your Honor please. [128]

The Court: What is that?

Mr. McKevitt: I object to his volunteering he always considered that.

The Court: Yes, that will be stricken and the Court will disregard it.

A. I met with my committee with respect to this letter of Mr. Etter's that was addressed to me and——

The Court: What you did or said with your committee is not admissible here. In my view, anyway, that would be pure hearsay, would it not?

Mr. Malott: Oh, yes, that is correct.

The Court: Committee members are not here to testify.

A. Following the meeting—may I say what I said to them?

The Court: No, that is hearsay. If you wanted to have the committee members testify, you should have brought them here as witnesses.

A. Following the meeting with my committee, I went to Mr. Keeton's office and I said, "It looks to me as if you got in pretty deep in this matter with Mr. Etter. I feel, and the committee has told me that they feel——"

Testimony of Ralph B. Defenbach.)

The Court: That is not proper.

A. "——we are acting in good faith."

The Court: I thought I told you it was hearsay that the committee told you, so please refrain from detailing it. [129]

Mr. Malott: Your Honor, I understand the witness is reporting a report.

The Court: I thought he was saying what his committee told him. If this is what you told Mr. Keeton, of course, you can always get it in under the guise of what you told Mr. Keeton.

Mr. McKevitt: That is what he is doing.

A. All right, I will leave the committee out.

The Court: Well, go ahead, whatever you told Mr. Keeton in detail what the committee told you, that is what you told Keeton, that is all right.

A. I told Mr. Keeton, I submitted—I tendered to Mr. Keeton \$3,750 to pay Mr. Etter's charge.

Mr. McKevitt: Now fix the date of that.

A. That would be a conference held with Mr. Keeton very shortly after April the 13th?

Mr. McKevitt: What year?

A. Of 1956. I told Mr. Keeton that I had read this letter that was addressed to him by Mr. Etter that Mr. Etter considered his services worth \$3,700 in this case, and I tendered payment of \$3,750 to Mr. Keeton to send to Mr. Etter. Mr. Keeton refused to accept it and then said that he was going to withdraw as my attorney from the action. [130]

The Court: Was that a tender that you made

(Testimony of Ralph B. Defenbach.)

in full payment of Mr. Etter's services in the trial court and for the appellate court, too, is that what you were doing?

A. It was a tender made by me to Mr. Keeton——

The Court: To pay Mr. Etter?

A. To pay Mr. Etter.

The Court: To pay him in full?

A. Yes, sir.

The Court: All right, go ahead.

Q. (By Mr. Malott): For clarification, that was solely for Mr. Etter, wasn't it?

A. Solely for Mr. Etter.

Q. For the services rendered up to that time and, of course, at that time he had completed all of the work in the lower court, hadn't he?

A. Yes.

Mr. Malott: I think that is all.

Cross Examination

Q. (By Mr. McKevitt): I am going to ask you this just blankly first, with reference to all of these conversations you claim you had with Mr. Keeton you never wrote him a single letter in confirmation of any of those conversations, did you? [131]

A. No.

Q. Why not?

A. I don't think I wrote Mr. Keeton with respect to anything on this estate. Came down to see him or I called him over the phone.

Testimony of Ralph B. Defenbach.)

Q. I asked why you didn't write him to confirm these various conversations?

A. It wasn't my custom to deal with him that way.

Q. Well, you appreciated your responsibility as the trustee under this agreement that Keeton drew, didn't you?

A. I recited everything to him in person.

Q. Did you at that time meet with the committee on different occasions and then you would go back and tell Keeton what the committee had said to you?

A. That is right.

Q. Did you ever ask Keeton to go with you to discuss the matter with the committee?

A. No, I don't think so.

Q. Why not?

A. Didn't think—I don't think that that was any responsibility to ask him.

Q. You felt you were under the guidance of this committee?

A. Yes.

Q. In every action you took with reference to funds that [132] came into your hands?

A. Yes.

Q. Now, then, you had certain discussions with members of the Internal Revenue Department, is that correct?

A. Yes, sir.

Q. And then you came back and told Keeton what they said to you?

A. That is right.

Q. And you never confirmed that by letter?

A. No.

Q. Didn't think that was necessary?

(Testimony of Ralph B. Defenbach.)

A. No.

Q. Do I understand that when you came into the fund arising out of the Omaha insurance policies that you got advice from somebody, Federal Government agency or other, that you could use that fund for administrative purposes?

A. Yes.

Q. And when you say administrative purposes, what do you mean, attorney's fees? A. Yes.

Q. Retainer? A. Yes.

Q. Costs that they might incur in preparing the case for litigation? [133] A. That is right.

Q. Office rent that you might have to pay where these records were impounded down there in Lewiston? You heard his statement in that regard, didn't you? Office rent?

A. That was not connected with this case.

Q. Why, if you felt that you had full authority to use this Omaha insurance — around \$8,000 wasn't it? A. Yes, 8,700.

Q. —for the successful prosecution of this litigation, why was it you didn't tender to Mr. Keeton any sum whatsoever to cover expenses that he would incur in coming to Spokane and going back to Lewiston?

A. Because he never submitted any bill.

Q. Never asked for any? A. No, sir.

Q. Now, I am going to put this to you blankly. You heard the testimony of Mr. Etter about a conversation at the Ridpath Hotel?

Mr. Etter: And my office.

(Testimony of Ralph B. Defenbach.)

Q. (By Mr. McKevitt): And his office here? You were in court when Mr. Etter testified under oath that such a conversation took place?

A. Uh-huh.

Q. And you say that Mr. Etter is mistaken, at least, he [134] is mistaken when he says that such a conversation took place?

A. I'm sorry to say, but that is correct.

Q. Nothing like it, huh?

A. No, sir. I was not available the night before this hearing was held. I didn't get in here until the late plane.

Q. Well, let's forget about whether it was the night before, let's say at any time immediately preceding the trial? A. Never.

Q. You never had such a conversation with Mr. Etter as he detailed here under oath?

A. I'm sorry, I never did.

Q. Did you have any discussion at all with Mr. Etter at any time or any place prior to the lawsuit about fees? A. No, sir.

Q. And you never received any letter of any kind or character from Mr. Etter prior to the lawsuit about fees? A. No.

Q. Nothing said about a retainer?

A. No, sir.

Q. When did you make the first disbursement out of this [135] \$8,000 from the Omaha in any wise touching the expenses of this litigation?

A. Maybe they are on that sheet over there, Mr. Malott. I have sketched them on that agreement.

(Testimony of Ralph B. Defenbach.)

(Document handed to witness.)

March the 14th, 1956, paid Rose McCloud \$280.

Q. That was, of course, after you were fully aware of the fact that there had been a judgment entered in your favor as trustee in the amount of some 60,000 and that this check had been made jointly in your name and the name of these attorneys, isn't it? A. Yes, I knew that.

Q. That is the check of the Clerk of this Court dated February 29, 1956 in the sum of \$60,302.94?

A. Yes, I was aware of it.

Q. Now, it is a fact it wasn't until after you knew of the existence of that check made jointly payable to you and your attorneys that you first took any interest so far as attorney fees or expenses of this litigation were concerned; that is correct, isn't it?

A. Well, word it differently.

Q. Pardon me?

A. Word it differently. Word it that I didn't make any expenditures.

Q. In other words, is it your position that you wouldn't [136] discuss attorney fees or expenses of this litigation of any kind or character until this lawsuit in this Federal Court here was determined; is that your testimony?

A. My testimony would be that it was agreed between Mr. Keeton and myself that we would wait until the final settlement of this, which he told me would be in the District Court in Nez Perce County,

(Testimony of Ralph B. Defenbach.)

and he was going to petition for a declaratory judgment in Nez Perce County, and at that point——

Q. Mr. Keeton told you he was going to petition Nez Perce, Idaho County Court for a declaratory judgment?

A. Yes, sir.

Q. Was that after the entry of this judgment and the payment of this check?

A. He told that to me on or about the 17th of April, 1955.

Q. Oh, 1955?

A. Yes.

Q. That was nearly a year before this check was issued?

A. That is right. But that that was his plan, he said, of handling this money.

Q. Declaratory judgment——

The Court: Pardon me, Mr. McKevitt. When was this case started here?

Mr. Etter: After that date. [137]

The Court: Was it afterwards? That was before his case started, at any rate, yes.

A. I don't know what he means by a declaratory judgment.

Q. (By Mr. McKevitt): Put it this way: Mr. Keeton told you sometime before this case was started here in October of 1955 that he was going to institute some kind of an action down in Nez Perce County Court; is that what he told you?

A. That is right.

Q. Did he tell you what type of action it would be?

A. My memory of it is a declaratory judgment.

(Testimony of Ralph B. Defenbach.)

Q. Well, did you ask who the parties to the lawsuit were going to be?

A. He is my attorney, I go by what my attorney tells me.

Q. Well, did he tell you who he was going to make parties plaintiff and defendant in that action?

A. I think probably all—my offhand knowledge of it would be or opinion would be all creditors.

Q. Hadn't anything to do with these insurance companies, then?

A. No. No, I don't think it had anything to do with the insurance companies.

Q. Now, you mentioned a gentleman by the name of Bert Heath, who is Collector of Internal Revenue, is he?

A. Yes. [138]

Q. At Boise?

A. At Boise.

Q. Is he still there?

A. Yes, sir.

Q. Did you contact him at all with reference to coming down here and being a witness in this suit?

A. Yes.

Q. When did you contact him?

A. I wrote him a letter on January the 21st, 1957. I also wrote a letter to Mr. Marion Collister, Assistant United States Attorney in Boise, on the same date, advising him of this case.

Q. Do you mean the case where these gentlemen are suing you?

A. Yes, sir.

Q. January of this year you—

A. January.

Q. Did you get a letter back from them?

A. No, sir.

Testimony of Ralph B. Defenbach.)

Q. Have you got the copies of the letters there?

A. Yes, sir.

Q. Let's see them. Are these in evidence here?

A. No.

Q. Now, you also heard Mr. Keeton's sworn testimony on this stand that he was present at the time of this [139] discussion that Mr. Etter detailed to Judge Driver? You heard that testimony?

A. Yes, sir.

Q. Nothing like that took place?

A. I have no knowledge of such a meeting.

Q. So, then, it is your considered testimony here that these men are either terribly mistaken in their testimony under oath or they are not telling the truth; is that what you are telling the Court?

Mr. Malott: Just a minute, I think——

The Court: I will sustain the objection to that.

Mr. McKevitt: All right.

Q. If you felt that you could use this \$8,000 for administrative purposes, why did you let your rent of this office down there that you hired for the purpose of impounding these books become in arrears for pretty nearly a year?

A. They really had nothing to do with this action.

Q. When you came up to Spokane for attendance at this trial, out of what fund did you pay your expenses? A. My personal funds.

Q. You have never drawn anything against this fund in your possession now for your own expenses? A. Yes.

(Testimony of Ralph B. Defenbach.)

Q. Have you? [140] A. Yes.

Q. When? A. July the 1st, 1956.

Q. How much? A. I drew \$60.48.

Q. For what purpose?

A. For expenses in attending the hearing that was held here on the 18th of October and for a conference with Mr. Harold Coffin on June the 5th of this year.

Q. Did you get authority from this advisory committee to make that expenditure?

A. Yes, sir.

Q. And you came up here to see Mr. Harold Coffin for the purpose of employing him to represent you in this case that these gentlemen had instituted? A. To carry the appeal.

Q. Carry the appeal through? A. Yes.

Q. Have you had any conversation with Mr. Coffin with reference to this case instituted by these gentlemen?

A. Yes. I asked Mr. Coffin if he could represent the trustee in this case and he said he couldn't.

Q. He declined to represent you? A. Yes.

Q. You discussed with him this question that was involved [141] and what these men were asking, didn't you? A. Yes.

Q. Mr. Defenbach, at all times you felt that any moneys that came into your hands as trustee in your fiduciary capacity, you had to protect the funds to the best of your ability for the benefit of creditors, didn't you? A. That is right.

Q. Now I call your attention to this check date

Testimony of Ralph B. Defenbach.)

February 29, 1956. Did you have any discussion with Mr. Etter as to what should be done with that check? You demanded it, didn't you?

A. No, sir.

Q. Didn't Mr. Etter suggest to you, since you and he and Keeton could not agree as to how this fund should be divided, that you should jointly deposit it where this fund could draw interest until this litigation was determined? Didn't Mr. Etter suggest that to you and you refused to do it?

Mr. Malott: Just a moment, just a moment, just a moment, please. I think that is an improper question. It has nothing to do with the merits of the case and the fee.

The Court: Well, I will sustain the objection.

Q. (By Mr. McKevitt): Now, you stated that Mr. Keeton, I believe you said, at the Ridpath Hotel put a proposition up to you that you would guarantee \$7,500, win [142] lose or draw, and \$15,000 if the lawsuit was won. You said that he put that kind of a proposition up to you?

A. Yes, sir.

Q. Mr. Keeton? A. Yes, sir.

Q. Sometime immediately before the trial in October of last year?

A. In the morning, on the morning of the trial, the morning of the trial, yes.

Q. Was Mr. Etter present at that time?

A. No, sir.

Q. Did Mr. Keeton say that he had discussed such a proposition with Mr. Etter?

(Testimony of Ralph B. Defenbach.)

A. He said what I testified to.

Q. And you said at that time you couldn't entertain any such an offer because you didn't feel you had authority as a trustee to do that, is that correct?

A. That is right, I didn't have my committee there to agree with me.

Q. Well, did you submit that proposition that you say Mr. Keeton made, did you ever submit it to your committee? A. No.

Q. Not at any time? A. No.

Q. Why not? [143]

A. Because Mr. Keeton never submitted it only at that particular time. He never presented it to me in writing.

Q. Did you ask for it in writing?

A. No, sir.

Mr. McKevitt: I think that is all, your Honor.

The Court: Any redirect?

Mr. Malott: I think that is all.

Mr. McKevitt: Need a little rebuttal here.

The Court: Yes, all right.

Mr. Malott: Oh, say, could I add one question?

The Court: Yes, all right. Just a moment.

Mr. Malott: It arises out of my letting a lot of hearsay go in. I am going to ask him one more question.

Redirect Examination

Q. (By Mr. Malott): Mr. Coffin was employed by you to prosecute this appeal?

A. That is right.

(Testimony of Ralph B. Defenbach.)

Q. To represent you on appeal? A. Yes.

Q. And you made a disbursement of how much on that appeal?

A. I gave him an advance of \$3,000, \$2,500 for the cost of the appeal and \$500 to cover expenses.

Q. Was that in full?

A. The \$2,500 was in full, yes.

Q. For fee on appeal. Now, the next thing, you mentioned you endeavored to get Mr. Coffin to represent you in this proceeding and Mr. McKevitt asked you if he had turned you down. Why did he refuse representation? Did he tell you why he was refusing to represent you in the fee squabble?

A. He told me that he thought that he needed some of Mr. Etter's files to successfully prosecute the appeal; he didn't feel that he wanted to get into this kind of an action.

Mr. Malott: Very well, that is all.

Recross Examination

Q. (By Mr. McKevitt): How much did you pay that firm altogether now? Was it \$3,000?

A. \$3,000.

Q. And can you break that down, attorney's fees and expense?

A. \$2,500 fees and \$500 expenses.

Q. And——

A. They told me that they didn't think the expenses would run \$500 and I would be getting a refund one of these days. [145]

Q. And he told you the reason he didn't want

(Testimony of Ralph B. Defenbach.)

to appear in your behalf in this case is because he had used certain files that Mr. Etter had in his office? A. No, he didn't say that.

Q. Well, you know that what he had used was the material that Etter had collected and Keeton in this Court so far as the legal cases were involved; you knew that, didn't you?

A. Yes, I knew that.

Mr. McKevitt: That is all.

The Court: Any other questions of this witness?

Mr. Malott: No further questions.

(Witness excused.)

The Court: All right, Mr. Keeton, then.

PAUL C. KEETON

a petitioner herein, resumed the stand on rebuttal, and testified further as follows:

Direct Examination

Q. (By Mr. McKevitt): Mr. Keeton, you have heard his testimony here? A. I have.

Q. Did you ever have a discussion of any kind, character [146] with this gentleman with reference to instituting any declaratory judgment action in the Nez Perce County Court? A. I did.

Q. When was it?

A. Shortly after Mr. Weyen died, Mr. Defenbach and I had a conversation in which he asked me his status on the \$8,000 or the \$8,750, and I said probably the only way that it could be figured

(Testimony of Paul C. Keeton.)

out would be to have a declaratory judgment on that in the District Court, which I did.

Q. No such conversation, then, as I understand your testimony, took place after the entry of any judgment in the case up here? A. Never.

Q. Now, with reference to his testimony about a conversation immediately preceding the trial about a flat fee of \$7,500, \$15,000 if you won, did any conversation like that take place?

A. Absolutely none.

Q. Was there any agreement between you and Mr. Defenbach about waiting until this whole matter was determined before any moneys were disbursed? A. Not on waiting, no.

Q. What was it? [147]

A. I told Mr. Defenbach on many occasions that we had conferences unless the \$66,000 case could be won, there wouldn't be anything for anyone and that he couldn't disburse any of those funds, even for his hotel bills or mine, I told him that, on account of these tax liens; unless the \$66,000 case was won, it would be better for him to give all the money, the \$8,700, or whatever it is, to the government, and that would be the end of it. I had that conversation with him.

Q. You had that conversation.

Q. Can you think of anything further I haven't asked you by way of rebuttal? A. No.

Mr. McKevitt: That is all.

Mr. Malott: No questions.

(Witness excused.)

Mr. McKevitt: We rest, your Honor.

The Court: I have just about reached the limit of my endurance here. I have been on the bench since 10 o'clock this morning, with the exception of one hour at lunchtime, and if you gentlemen want to argue this, I think we better argue it at 1:30 tomorrow afternoon.

Mr. McKevitt: I had suggested to Mr. Malott as far as we were concerned, because of your Honor's knowledge [148] of the case, having tried it below on that phase of it, anyway, that I would be glad to submit the case without argument.

The Court: What is that old saying in the television, "You'll be sorry."

Mr. McKevitt: No.

The Court: Mr. Malott.

Mr. Malott: There are a couple of instances—I am agreeable. What I would like to do, if your Honor please, I would like to get a letter, which I would limit to a page. I will limit to a page letter, one page, that I will get down here before noontime.

The Court: Well, I have no objection to your putting in written memoranda, if you wish.

Mr. McKevitt: I will wait until I get his letter.

The Court: Then you write to me.

Mr. McKevitt: Then you let me send a copy.

The Court: Well, all right. I am not trying to cut you off from oral argument, but really I am not in a position to absorb any more today. I am just about bushed, to resort to a colloquial expression, and if you want to argue, I would have you

argue tomorrow afternoon. If not, you can submit a letter and counter-letter. How would that be?

Mr. McKevitt: I think what I would like to do [149] at this time on this matter of fees, I would just like to leave with your Honor this Journal of the American Adjudicature of October and December, 1956, New York contingent fee schedule. It may be helpful and——

The Court: Have you seen this thing?

Mr. Malott: No.

The Court: I have heard about it.

Mr. McKevitt: I will leave it with your Honor.

The Court: Very well. Let's see, that is the October-December, 1956 issue, Mr. Malott.

(Which was all of the evidence adduced and proceedings had in the hearing of the above-entitled cause.) [150]

[Endorsed]: Filed March 18, 1957.

RESPONDENT'S EXHIBIT "C"

United States Department of Justice
United States Attorney
District of Idaho

Boise, Idaho, Nov. 16, 1955

Mr. Ralph Deffenbach
Certified Public Accountant
Lewiston, Idaho

Re: U. S. v. R. F. Weyen (deceased) Civil No.
1978-C. Also C-50 and C-52-B.

Dear Mr. Deffenbach:

Last spring I communicated with you in regard to the claim of the United States by reason of a judgment against Mr. Weyen in the sum of \$444.20. Since that time I have been advised of two other claims which the United States has against Robert F. Weyen. One is for the sum of \$826.28, which arose by reason of the trespass on forest lands and the conversion of forest timber of the value of \$826.28. This conversion occurred between July 20 1953 and August 3, 1953 on Section 11, Township 7 North, Range 44 East, of Umatilla National Forest.

The other claim is a claim of the Internal Revenue Service for the sum of \$34,398.62 for withholding and employment taxes from September 30 1953 through September 30, 1954.

The United States is entitled to priority of payment of these claims by reason of federal statute 31 USC 191. 31 USC 192 makes the assignee fo

Respondent's Exhibit "C"—(Continued)

the benefit of creditors personally liable to the United States if he fails to pay the debts of the United States before paying other creditors.

I realize that the handling of this matter must be very difficult for you and very time consuming but it is necessary that I know your position in regard to these claims and whether we can expect payment from the assets assigned to you as trustee for benefit of creditors. I would appreciate receiving this information as soon as you can conveniently provide it.

Very truly yours,

Sherman F. Furey, Jr.,
United States Attorney,

/s/ By Marion J. Collister,
Assistant U. S. Attorney.

LJC/nr [152]

RESPONDENT'S EXHIBIT "D"

Law Offices of Paul E. Keeton
Lewiston, Idaho

Mr. Ralph B. Defenbach, June 6, 1956
12 Ninth Avenue, Lewiston, Idaho.

Re: Sun Life Assurance Co. and Maccabees Ins.
Co. vs. Weyen et al.

Dear Ralph:

I advised you that I would write you and tell you that I am in accord with the contents of Mr.

Respondent's Exhibit "D"—(Continued)

Etter's letter dated 1 June 1956. I am especially in accord with his feelings that an offer of \$3750.00 for services rendered would not be fair compensation for your attorneys in this matter.

It was impossible for me to appear in the state of Washington as your attorney without joining some attorney in that district as co-counsel. Your attention is called to the rules of the District Court of the United States, for the Eastern District of Washington, and especially Rule 1 (g), as follows:

“(g) Office Address within the State:

Should a party in any cause not appear in person, and should his attorney not maintain an office in this State, there shall be joined of record in such appearance, or within ten (10) days thereafter, an associated attorney having an office in this District and admitted to practice in this court.”

If I could have appeared in the state of Washington without joining some person as co-counsel I would have been happy to do so. You never made any suggestions about whom you wished to join as counsel and I never made any requests to you for any suggestions in this matter. I knew from long experience that Mr. Etter specializes in Federal practice and has taken 13 cases to the Circuit Court of Appeals during the last seven or eight years. This would be more than all of the other lawyers in the City of Spokane have taken to the Circuit Court in a similar length of time. Mr. Etter has had wide success in Federal cases and is known throughout the Bar as a very able

Respondent's Exhibit "D"—(Continued)

attorney. I assume that I could have sought less experienced co-counsel or perhaps counsel who would work at very small fees; but it seemed to me that it was important that this case be won in the District Court at Spokane and, of course, we proceeded to handle the case to the best of our ability with the result that some \$66,000.00 has now been awarded to you in the Sun Life and in the Maccabees cases. At no time did we ever suggest that you offer any settlement in this case to any of the defendants. I am certain that you have no argument with either Mr. Etter or me concerning the able way in which this case was handled, both at the trial and in the preparation of the briefs on the legal points.

Naturally I am very sorry that it is necessary for me to join with Mr. Etter in withdrawing as attorneys in this matter and in filing a lien on the recovery in both of these cases: again, I am sorry that you would never agree with us that this money should be put out on interest, subject to withdrawal only upon signature by yourself and your two attorneys. Failure to have this money at interest causes a loss of nearly \$180.00 per month.

If you wish to have a meeting with your committee, I will be happy to appear before this committee and express my feelings orally. I do not consider that there is anything unethical in lawyers withdrawing if they can not agree with their clients in regard to fees. I hold no animosity toward you or any of the committee in this matter. I feel

Respondent's Exhibit "D"—(Continued)

that it was a mistake on the part of all parties to have entered into this litigation without some understanding in writing regarding the payment of attorney fees. [153]

I was served with a copy of the Appellant's Brief this afternoon, which means that the counsel you retain to continue this matter will have to serve and file their brief within thirty days from the time of service upon us. The rules of the Circuit Court of Appeals provide that in extraordinary circumstances, an extension will be granted; and it might be that your attorney could make a petition, advising the court of the circumstances and get an extension in which to prepare his brief.

When I discussed this matter with you orally, I advised you that I would let you know that I do not make any charges against the creditors' pool, you or the committee, for services rendered heretofore other than those which I claim due me on account of the Sun Life and the Maccabees cases. As far as acting as attorney for the Special Administrator, fees for conferences, letters, telephone, costs, etc., I make no claim, nor will I make one in the future for attorney fees. As far as traveling expenses, phone calls, hotel rooms, meals and incidental expenses while representing you as trustee, you are advised that I make no claim for these, except insofar as they pertain to the Sun Life and Maccabees cases and I assume that a full accounting will have to be given to the judge at the time of the hearing on our lien.

Respondent's Exhibit "D"—(Continued)

A copy of the Appellant's Brief is enclosed.

Yours truly,

Paul C. Keeton.

CC:R. Max Etter, Esq.

Original letter and brief mailed to Mr. Harold Coffin, 602 Spokane and Eastern Building, Spokane, Washington, June 7, 1956.

Ralph B. Defenbach.

Copies of letter to H. M. Emerson and Russell S. Randall.

Copy of letter retained in file of Trustee. [154]

RESPONDENT'S EXHIBIT "E"

[Letterhead of Etter and Connelly]

Mr. Paul C. Keeton, Esq. March 26th, 1956
Suite 1 Porter Bldg., Lewiston, Idaho

Re: Sun Life Assurance Co. of Canada, a corporation, plaintiff, v. Weyen, individually, et al., Elfrieda May, etc., U. S. District Court Civil No. 1309, U. S. Court of Appeals for the Ninth Circuit (Undocketed). [Pencil figures: 65,000]
The Maccabbees v. Weyen, et al., etc. U. S. District Court Civil No. 1308. [Penciled figures: 5700]

Dear Paul:

I have not had the opportunity to write you about the situation concerning our client, Ralph Defenbach, with respect to the above-entitled cases. I

Respondent's Exhibit "E"—(Continued)

find that it is wholly necessary to do so at this time because appearance has been made in the Court of Appeals for the Ninth Circuit by the attorneys in the cause which will be docketed. Likewise, the matter of preliminary motions must be taken care of in the Maccabbees case, and in all probability there will be some disposition made by pre-trial conference on the basis of ruling of the Court on Motion for Summary Judgment.

I mention these things to you because it seems apparent from Mr. Defenbach's position that he has some implied authority somewhere to employ attorneys, but apparently no authority to pay them. I want you to advise Mr. Defenbach that I cannot continue to act as an attorney in this cause any longer under this type of an arrangement. I have not done so in all the years of my practice, and can see no compelling reason to do so now. I have argued, I think in all, about fifteen cases in the Court of Appeals at San Francisco, and I have emphasized Federal Practice and Procedure in my practice. I consequently feel that I have some qualifications with respect to federal practice and I certainly do not intend to proceed with all of the work and hazards of this appeal, and probably a further one after litigation, in the Maccabbees case, as the situation presently stands. [155]

Mr. Defenbach's apparent feeling that some fee basis should be entertained on the basis of the award to the plaintiff is an appalling misunderstanding of the position of the litigants in this case

Respondent's Exhibit "E"—(Continued)

Mr. Greenough, the attorney for plaintiffs merely handed the money to the Clerk and told the defendants to figure out the law if they wanted any of it. By virtue of trial and a tremendous time spent in research, we came up with the cases, particularly the leading case in Washington, which sustained an otherwise not too solid position and recovered the large judgment. Now it seems that this whole matter of payment to the attorneys must remain in some kind of a "limbo" the end result of which none can foresee, but with the apparent feeling that the attorneys will continue all of the litigation with no understanding at all as to any compensation from any source.

On that basis, I wish you would advise Mr. Defenbach that I cannot continue as counsel, and unless immediate steps are taken to the solution of this problem I am withdrawing as counsel in all of these cases and demanding full compensation at this time.

It is inconceivable to me that a definite arrangement cannot be made for the deposit of these funds in an interest-bearing institution where the funds could earn \$2,000.00 or more before the case is finally processed and disposed of in the Appellate Court, and I think that Mr. Defenbach should consult his committee, or, failing that, his committee should be advised that this is a completely indefensible and foolish position which he takes. It was my understanding that in as much as this case

Respondent's Exhibit "E"—(Continued)
was taken on a contingent basis that 20% of the recovery was not excessive and was, in fact, an agreeable amount, keeping in mind that its payment out of moneys now recovered still leaves the Trustee with a lot more money than he would have had had a settlement been reached in the case in accord with discussions had with the other litigants. That being so, I am insistent that as to my share of the fees that I be paid one-half of the 20% now recovered, or the approximate amount of \$6,000 some odd dollars—and that only if there is agreement that we continue further with these cases. If it is not agreeable that I continue further in accord with my proposal, then I shall expect to be paid \$7500.00 for the work which has been done in addition to the trial work in the main cause. Furthermore, in addition to the payment of the percentum of recovery which I have demanded, I am insisting that agreement [156] be made for the payment of 30% of the recovery in the event favorable disposition is made on appeal. I feel that I can assume my own responsibilities in the event disposition is not favorable. Furthermore, as attorneys, it is absolutely necessary that we get this fund into a bank and earning money. Mr. Defenbach should be so advised.

I will expect a prompt reply.

Very sincerely yours,

/s/ R. Max Etter.

RME:S [157]

Respondent's Exhibit "E"—(Continued)

[Letterhead of Paul C. Keeton]

Mr. Ralph B. Defenbach 11 April 1956
712 Ninth Avenue, Lewiston, Idaho

Re: Sun Life Assurance Co. vs. Weyen et al. Mac-
cabees Insurance Co. vs. Weyen et al.

Dear Ralph:

Max Etter wrote me a letter several days ago, a copy of which is enclosed; but I have not had an opportunity to discuss it with you. Today he called me on the telephone and told me that tomorrow he is going to go into court in the Maccabees case and move for a summary judgment, which he expects the Court to grant on account of the ruling established in the earlier case. He also told me that he does not feel that he should go any further into the appeals on these cases without a definite understanding regarding fees and he wanted me to discuss his letter with you. I am going to be in Moscow trying a case before the Federal Court for the next several days, so you can be thinking this matter over and I will be happy to discuss it with you.

We expect that if summary judgment is granted in the Maccabees case, Rowan and associates will also take an appeal in this matter, requesting that it be joined with the other case, making a decision in the first case binding in both matters before the Circuit Court of Appeals.

Yours truly,

/s/ Paul C. Keeton.

K:b—Encl: 1 [158]

Respondent's Exhibit "E"—(Continued)
[Letterhead of Etter and Connelly]

(Copy)

April 13th, 1956

Mr. Paul C. Keeton, Attorney at Law
Suite 1, Porter Block, Lewiston, Idaho

Re: Sun Life Assurance Co. v. Weyen et al. Maccabees Insurance Co. vs. Weyen, et al.

Dear Paul:

I am in receipt of copy of letter which you wrote to Mr. Ralph B. Defenbach on April 11, 1956.

In considering this matter I must concede some degree of reason for Mr. Defenbach's position, in that he is charged with a responsibility as Trustee. Consequently, I would assume that he could not have objection to the payment of fees if he is protected to the extent of any personal obligation that he may have to account for such fees in the event of an unexpected reversal by the Court of Appeals. However, by the same token, I fail to see that he would have any justification for refusal to pay fees if he is personally protected against any loss as a result thereof.

Consequently, I propose that in the event he will pay my fees on the present basis which I wrote about, I shall, and do hereby, agree to hold Mr. Defenbach harmless against the probability or actuality of him having to make good any part of the fees paid to me with the following exception. It was my understanding that in any event we were to be paid a flat fee for this litigation—that is, the first Sun Life cases and the Maccabees case. I think

Respondent's Exhibit "E"—(Continued)

that the flat guarantee to which we should be entitled for these cases, and the appeal, should be \$3750.00, plus costs and expenses in the event of ultimate loss. Therefore, if Mr. Defenbach will pay me now, in accord with my letter to you, I would, as I have said, hold him harmless for any personal responsibility for any of the sums paid me as fees, minus, however, one-half of the agreed fee which I understand will be paid—win, lose or draw. As you well know, I am fully and completely responsible financially in the amount of the fee which is involved, and am financially responsible far above any exemptions that would attach to me or to the community constituting my family. [159]

Now that I have made this guarantee, so far as Mr. Defenbach is concerned, I fail to see why there should be any further difficulty involved in effecting an amicable handling of this entire matter, assuming that agreement can be made with us on the ultimate disposition of a percentage for all of our work in this case if we are successful in San Francisco in the Appellate Court.

I will, therefore, ask for prompt disposition of the matter in accord with this letter.

Very sincerely yours,

/s/ R. Max Etter.

RME:S

Signed copy to: Mr. Ralph B. Defenbach, 712 Ninth Avenue, Lewiston, Idaho. [160]

Respondent's Exhibit "E"—(Continued)

[Letterhead of Etter and Connelly]

Mr. Ralph B. Defenbach June 1st, 1956
712 Ninth Avenue, Lewiston, Idaho

June 1st, 1956

Dear Mr. Defenbach:

I refer to my letters of March 26th, 1956 and April 13th, 1956, and also to my conversation with Mr. Paul Keeton on the 31st day of May here in Spokane.

Mr. Keeton advises that you, after consultation with your committee, have proposed the payment of fees for services rendered in this case in the amount of \$3,750.00. Without any further discussion, I advise you that your proposal is rejected.

From the commencement of this action there was unwillingness on your part to assume any risk in this litigation by paying an agreed and substantial fee for the prosecution of the claims of the creditors. You were wholly content to let the attorneys take the risk involved, and I do not doubt but that had the attorneys lost the action they would have had to take vigorous steps in order to recover any fees from you. On the other hand, you did not reject the idea or proposal of a contingent fee based upon the necessity of the attorneys making some recovery. Now, of course, substantial recovery has been made, and I do not know of a Court in the land that would not consider a fee of 20% on contingency as a reasonable fee under the circumstances. Likewise, I do not believe that any Court would hold that a fee of 30% for the handling of

Respondent's Exhibit "E"—(Continued)

appeal in the Court of Appeals would be other than reasonable, keeping in mind that these fees apply for not only handling the Sun Life case, but likewise the Maccabees.

We have recovered approximately \$65,000.00 to \$66,000.00 and on the basis of a conservative contingent arrangement such as I have outlined, we would be entitled to some \$13,000.00 for our recovery thus far, and some \$19,000.00 or \$20,000.00 in the event the verdict is sustained on appeal. You, however, have refused, until the other day, to make known your position and have now adopted an attitude that you will pay only a sum equal to less than 6% of the amount recovered, even though we have taken all the risk in handling it on a contingent basis. [161]

Nevertheless, if this matter can be settled, I desire to settle it now.

I propose that if you desire to settle this matter, you immediately pay me as and for the services of both counsel the sum of \$8,250. If you desire that we continue this appeal to its conclusion in the Court of Appeals on a paid fee basis, then it is my proposal that the sum of \$4,250.00 additional be paid, plus costs and expenses involved. If you desire to pay \$8,250.00 at this time for work already performed and desire that the appeal be handled on a contingency basis, then I propose that if the appeal is won the attorneys receive \$6,000.00 additional.

If you do not desire to pay any fees, but desire that this whole matter be taken on a contingency,

Respondent's Exhibit "E"—(Continued)
no further proceedings will be taken until an agreement is entered providing for payment of 30% of the recovery made in the cause.

I am advised by the Circuit Court that the Brief of the opposition is due on the 14th day of June, and that thereafter we must write and file our Brief within thirty days. If you are not going to reach any agreement, then I am going to withdraw from this case, and I am authorized to advise that Mr. Keeton will withdraw also. In that event, I shall serve and file a lien for attorney's fees with the Clerk of the Federal District Court which lien shall run against the check now in my possession and all of the other papers and records in this case. In that event it will be up to you to hire yourselves lawyers for the purpose of finishing this appeal and likewise for the purpose of contesting a proper and adequate award to us in accord with services performed.

Because the time is short, and because I desire to give notice before I incur any more work or obligation in writing the Brief, I am going to insist that your answer be in my hands not later than Thursday, June 7th, 1956. In the event I do not receive it I shall promptly give notification of my withdrawal and shall serve you with a lien for services.

Very truly yours,

/s/ R. Max Etter.

RME:S

cc: Mr. Paul Keeton, Porter Building, Lewiston,
Idaho. [162]

Title of District Court and Causes Nos. 1308-1309]

STATEMENT OF POINTS

to the above entitled Court and to Stanley D. Taylor, Clerk thereof, and to R. Max Etter and Paul C. Keeton and Francis J. McKevitt, your attorney:

You Are Hereby Notified that the following is statement of points upon which the appellant, Ralph B. Defenbach, as trustee, will rely on his appeal to the Court of Appeals for the Ninth Circuit:

1. Fifteen thousand dollars (\$15,000.00) is excessive compensation for the services of petitioning attorneys in these proceedings.
2. The trial court erred in finding that \$15,000.00 was reasonable compensation for such services.
3. The trial court erred in entering judgment for \$15,000.00 as compensation for such services.

Dated this 9th day of April, 1957.

/s/ THOMAS MALOTT,
Attorney for Defendant. [163]

Acknowledgment of Service Attached.

[Endorsed]: Filed April 9, 1957.

[Title of District Court and Causes Nos. 1308-1309]

CERTIFICATE OF CLERK

United States of America,
Eastern District of Washington—ss.

I, Stanley D. Taylor, Clerk of the United States District Court for the Eastern District of Washington, do hereby certify the attached pages numbered from 1 to 157 inclusive to be a full, true, and correct copy of so much of the record, papers and proceedings in the above entitled cause as are necessary to the hearing of the appeal therein in the United States Court of Appeals as called for by Defendant-Appellant's Designation of Record on Appeal, as the same are on file and of record in the office of the Clerk of said District Court, to-wit:

Stipulation, filed April 27, 1956.

Order, filed May 2, 1956.

Notice of Lien, filed June 20, 1956.

Notice of Lien, filed June 20, 1956.

Findings of Fact and Conclusions of Law, filed December 30, 1955.

Judgment, filed December 30, 1955.

Petition, filed January 22, 1957.

Answer to Petition, filed January 31, 1957.

Findings of Fact and Conclusions of Law, filed February 8, 1957.

Judgment, filed February 8, 1957.

Notice of Appeal, filed March 8, 1957.

Cost Bond on Appeal, filed March 8, 1957.

Reporter's Transcript of Proceedings at the

Hearing, filed March 18, 1957.

Respondent's Exhibit C.

Respondent's Exhibit D.

Respondent's Exhibit E.

Statement of Points.

Designation of Record on Appeal.

I further certify that said record and exhibits constitute the record on appeal from the Judgment of the United States District Court to the United States Court of Appeals for the Ninth Circuit at San Francisco, California.

I further certify that no charge has been made for the preparation of this record on appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at Spokane in said District this 12th day of April, 1957.

[Seal] /s/ STANLEY D. TAYLOR,
Clerk of said District Court.

[Endorsed]: No. 15515. United States Court of Appeals for the Ninth Circuit. Ralph B. Defenbach, as Trustee, Appellant, vs. R. Max Etter and Paul J. Keeton, Appellees. Transcript of Record. Appeal from the United States District Court for the Eastern District of Washington, Northern Division.

Filed: April 15, 1957.

 /s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15515

RALPH B. DEFENBACH, as Trustee,
Appellant.

vs.

R. MAX ETTER and PAUL C. KEETON,
Appellees,

DESIGNATION OF PRINTED RECORD

To the above entitled Court and to Paul P. O'Brien,
Clerk thereof, and to R. Max Etter and Paul
C. Keeton and Francis J. McKevitt, your at-
torney:

You, and Each of You, are hereby notified that
the appellant, Ralph B. Defenbach, as Trustee,
upon the filing of the Statement of Points on which
he intends to rely on appeal, does hereby file and
designate all of the record which is material to the
consideration of the appeal and which shall be
printed as the record on such appeal, to-wit:

Stipulation in cause No. 1308, filed April 27, 1956.

Order in cause No. 1308, filed May 2, 1956.

Two notices of lien filed in causes Nos. 1308 and
1309, June 20, 1956,
and the following records and proceedings filed in
cause No. 1309:

Findings of Fact and Conclusions of Law, filed
December 30, 1955.

Judgment, filed December 30, 1955.

Petition of Etter and Keeton, filed June 22, 1956.

Answer of Ralph B. Defenbach, as Trustee, filed January 31, 1957.

Findings of Fact and Conclusions of Law, filed February 8, 1957.

Judgment, filed February 8, 1957.

Notice of Appeal, filed March 8, 1957.

Transcript of Evidence, filed with the District Court March 18, 1957.

Exhibits "C", "D" and "E" adduced at the hearing in this proceeding on January 31, 1957.

Statement of Points on Appeal filed with the District Court April 9, 1957.

Designation of Record filed with the District Court April 9, 1957.

This designation.

Dated this 12th day of April, 1957.

/s/ THOMAS MALOTT,
Attorney for Appellant,
Defenbach.

Acknowledgment of Service Attached.

[Endorsed]: Filed April 15, 1957. Paul P. O'Brien, Clerk.

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IN THE
UNITED STATES
Court of Appeals
FOR THE NINTH CIRCUIT

RALPH B. DEFENBACH, as Trustee,
Appellant,

vs.

R. MAX ETTER and
PAUL C. KEETON,
Appellees.

No. 15515

APPELLANT'S BRIEF

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN
DISTRICT OF WASHINGTON,
NORTHERN DIVISION

THOMAS MALOTT
SIDNEY SCHULEIN

Attorneys for Appellant

708 Spokane and Eastern Building
Spokane 1, Washington

FILED

JUL 24 1957

IN THE
UNITED STATES
Court of Appeals
FOR THE NINTH CIRCUIT

RALPH B. DEFENBACH, as Trustee,	}	No. 15515
<i>Appellant,</i>		
<i>vs.</i>		
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STATEMENT AS TO JURISDICTION

This Court and the District Court have jurisdiction by virtue of the interpleader statute, 28 USCA §1335 (R. 9), and by virtue of the holding of this Court in *U.S. v. Moulton and Powell*, 188 F. (2d) 865. This Court there held that where a fund was paid in to the registry of the District Court, and under Washington law and procedure an attorney's charging lien pursuant to RCW 60.40.010 was filed against the fund, the District and Circuit Courts were the proper forums to determine the amount of the attorney's charge. The case at bar involves interpleader of life insurance proceeds, with the sole question being the amount of attorney's charging lien for their services in recovery of the interpleaded fund (R. 7-8).

STATEMENT OF THE CASE

This is an appeal from a judgment of the trial court allowing appellees \$15,000 as attorneys' fees for representation of appellant, as assignee for the benefit of creditors, in the trial of interpleader actions in the District Court.

Background Facts

On September 22, 1953, Robert Weyen divorced his wife, Mary (R. 10). In the decree he was awarded ten insurance policies. The next day he executed an agreement, naming his attorney, Stanfill, the beneficiary of a trust, the corpus of which was the ten policies (R. 11); on death the trustee was to use the proceeds for the benefit of Weyen's children, but Weyen made the following reservation in the trust agreement:

"The donor specifically reserves the right, during the term of this trust, to pledge any of such policies as collateral, or to exercise the loan rights as provided in said policies, and in the event the donor makes application for such loans, it is hereby understood that the signature of the Trustee herein named shall not be required to join in the application for said loans." (R. 11)

Prior to November 16, 1954, Weyen was unable to pay his debts (R. 12), having \$60,000 of unsecured creditors and \$140,000 of creditors holding securities on logging equipment (R. 39, 102), and on that date he legally assigned to appellant Defenbach all of his property, including eight policies interpleaded in the District Court, seven with Sun Life and one with the Maccabees (R. 3, 4, 12), for the benefit of his creditors (R. 12). Weyen died April 16, 1955 (R. 102) and the insurers having interpleaded, the issues were between appellant, the children of Weyen, and Stanfill, the trustee. Two actions were brought, one by Sun Life involving seven policies totaling \$60,302.94 (R. 21) and the other by the Maccabees totaling \$5,731.49 (R. 4) It was decided to try the Sun Life case, and this was done in one day, October 18, 1955 (R. 8) The parties stipulated on April 16, 1956, that since the issues were the same, decision of the Maccabee's case, involving only the sum mentioned, would abide the decision in the Sun Life case (R. 3-5), which was then on appeal to this Court (R.3). The Maccabees' case was never tried but judgment was entered on stipulation after the final decision of this Court (R. 32-35).

Judgment was entered in the Sun Life case on December 30, 1955, awarding the policy proceeds to appel-

lant Defenbach, who was represented throughout the proceeding by appellees Etter and Keeton. Appellee Etter maintains his office in Spokane, Washington, and appellant Defenbach and appellee Keeton have their offices in Lewiston, Idaho. The opinion of the District Court is reported sub nom *Sun Life Assurance Company of Canada v. Weyen* 136 Fed. Supp 592. Thereafter the case was appealed to this Court, and appellees Etter and Keeton having resigned, appellant (appellee there) was represented by Harold Coffin and Paine, Lowe, Coffin, Ennis & Herman. The fee charged and paid in advance by Defenbach was \$2,500, plus costs (R. 125). The opinion of this Court is as yet unreported but was published on January 4, 1957, in Cause No. 15080, which affirmed the ruling of the District Court that appellant Defenbach was entitled to the policy proceeds. Both the opinion of the District Judge and of this Court turned on a single Washington case, *Massachusetts Mutual Life Insurance Company v. Bank of California*, 187 Wash. 565, 60 P. (2d) 675. That this one case is the basis of the decision of both Courts is admitted in the testimony of Mr. Etter, one of appellees (R. 76-77).

PLEADINGS AND PROCEEDINGS

On January 20, 1956, while the Sun Life case was on appeal to this Court, Etter and Keeton filed lien claims in both cases, alleging the value of their services up to June 7, 1956, was \$16,500 (R. 6-7). On January 22, 1957, they served and filed a petition to foreclose the liens filed (R. 19-22). The answer of appellant Defendant (R. 23-24) admitted that Etter and Keeton had repre-

sented him in the two actions; that he was willing to have the fee fixed; that the original employment was Keeton's but Etter was later employed by Keeton, which employment was later ratified by Defenbach; and that the two actions were successful. It was denied that \$16,500 was either reasonable or agreed (R. 23). The issue was resolved to the single question of how much should be allowed Etter and Keeton for services in the two cases in the trial court and partially on appeal, up to and including June 7, 1956, when Paine, Lowe, Coffin, Ennis & Herman took over the cases as attorneys for appellee in this Court.

The case was tried the afternoon of January 31, 1957 (R. 31), and the Court's findings and judgment were signed February 8, 1957. The Court found there was no express contract for attorneys' fees but that Etter and Keeton rendered successful services of the "fair and reasonable value" of \$15,000 (R. 26-27). The Court further found that notwithstanding there was no contract,

"That for all practical purposes the employment of said petitioners by said defendant was on the basis of a contingent fee, since it appears from the evidence introduced in said causes that said petitioners would not have been paid a flat fee if the litigation which they conducted had not terminated successfully." (R. 26)

TRIAL EVIDENCE

At the beginning of trial Mr. McKevitt, representing appellees, stated:

"THE COURT: Is it a claimed contractual fee?

"Mr. McKEVITT: . . . However, I will say at the outset now that we are not in a position to establish a definite contract between these attorneys and Mr. Defenbach as to any fee, contingent or otherwise, and we are here on the basis that this amount of \$16,500 is a reasonable fee, under all the circumstances, to be allowed." (R. 33)

Keeton testified that he prepared the Weyen creditors' pooling agreement wherein Defenbach was named trustee (R. 38). In Defenbach's capacity as assignee for the benefit of creditors of the deceased Weyen, Keeton acted as Defenbach's attorney in Idaho. Defenbach had been cautioned by the Internal Revenue Bureau that the United States claimed priority for tax liens and timber trespass (R. 46), and Mr. Keeton advised him on many occasions that unless the insurance proceeds were recovered for the benefit of the estate,

"... there wouldn't be anything for anyone and that he couldn't disburse any of those funds, even for his hotel bills or mine, I told him that, on account of these tax liens; unless the \$66,000 case was won it would be better for him to give all the money, the \$8,700 or whatever it is, to the government and that would be the end of it. I had that conversation with him." (R. 127)

The \$8,700 was collected by Defenbach immediately following Weyen's death on a health and accident policy.

According to Keeton, the day before trial of the Sun Life case, that is, the day before October 18, 1955, Keeton and Defenbach had come from Lewiston, Idaho, to

Spokane for the trial. Keeton told Defenbach he had prepared a letter he was going to give him concerning a fee arrangement "as we had none so far". Defenbach said he could not agree to any fee because he had no authority from his creditors' committee. Keeton said he went over to Etter's office and told him what Defenbach had said, and the three of them met in the Ridpath Hotel (R. 49). Mr. Etter had been hired by Keeton on July 25, 1955 (R. 50). According to Keeton, at the hotel Defenbach reiterated he was afraid of tax liens and could not contract for fees, and that at that time Mr. Etter asked for a retainer. When Defenbach refused, Etter stated, "We take these cases on a contingent fee", and he further stated the usual percentage was twenty-five per cent if settled, thirty per cent if tried, and forty per cent if appealed (R. 52). Defenbach said that while he had no objection to it, he could not agree to anything. The matter was left there (R. 52). Mr. Keeton stated that it had been agreed between him and Defenbach that a bill would not be rendered until the conclusion of the cases (R. 58) and Keeton said he hoped to collect a flat fee if the litigation was unsuccessful and if the government didn't take it all (R. 62, 63). The claim of the government was about \$36,000 (Ex. C; R. 130). Other than the conversation at the Ridpath Hotel, according to Mr. Keeton, the only demands for a fee arrangement were by Mr. Etter (R. 63).

Mr. Etter testified that his recollection of the fee conversation was that they were both at the Ridpath Hotel and at his office (R. 71). He testified that the day

before trial, that is, October 17, 1955, he, Etter, told Keeton:

"I should like to have it on at least a partly retainer basis . . . I had made a proposal on fees before and I repeated it generally to Mr. Defenbach. I had suggested if he wanted us to try this case, take it up on through appeal, that if he was willing to pay a retainer of \$2,000, it would be acceptable through the courts on a prescribed fee of 20 or 30 per cent. . .

"Mr. Defenbach explained to me that he wouldn't be able to pay anything, then or on appeal. In fact when I questioned him, he told me that if we should lose or if there was some necessity for appellate procedure, that he still couldn't pay anything and that it would be incumbent on the attorneys to assume all of the costs of the litigation and the costs of the appeal and all the rest of it . . .

"I told him that as long as we were in the case, we would try it out on that basis . . .

"He made his position clear that he couldn't pay and, although I was disappointed—I hate to take a case on that type arrangement—we agreed that we would do it, and that was it.

"Q. Was it your feeling at that time from your knowledge of the whole situation that unless there was a successful outcome to this suit here and above, that you and Mr. Keeton would be out your time and out of pocket?

"A. Absolutely . . ." (R. 71-74)

With regard to the testimony concerning conversations relating to fees, Mr. Defenbach testified that he did not meet Mr. Etter until the day of the trial and that he could not have met him before that date because he did not arrive in Spokane from Lewiston until late at night on October 17, 1955 (R. 108).

Defenbach further testified that shortly after April 15, 1955, he and Keeton agreed not to charge any fees against the fund until the Idaho court officially closed the estate after conclusion of the litigation on the insurance policies (R. 103). Keeton says he was a proper person to represent Defenbach in the Idaho assignment estate because he was familiar with Weyen's affairs and Weyen owed him some \$1,900 (R. 105). Defenbach received \$8,700 on a health and accident policy and had several meetings with agents of the Internal Revenue Department through May and June, 1955 (R. 106). Defenbach told Keeton he had talked with the Internal Revenue Department officials, that he had informed the officials he had \$8,700 and had asked to use it for administrative expenses, and that the Internal Revenue Department had taken the position that it would not interfere with the use of the money for costs of administration (R. 107). Keeton was told that the money was "practically dedicated to the purpose of protecting the estate" (R. 106) by payment of attorneys' fees, retainer and costs (R. 116).

Contrary to the testimony of Mr. Etter, Defenbach testified that he and Keeton met in the Ridpath Hotel lobby on the morning of October 18, 1955, the day of the trial (R. 108), and Keeton then asked for a fee of "\$7,500, win, lose or draw, and \$15,000 in case we win" (R. 109). Keeton in his testimony categorically denied this conversation (R. 127). Defenbach testified he told Keeton he could not agree without the consent of his creditors' committee (R. 109). Defenbach categorically denied that he ever discussed fees with Etter at any time and stated

that the first time he ever heard Etter mention fees was in his letter of March 26, 1956 (Ex. E; R. 135) hereinafter referred to.

About April 1, 1956, at Keeton's office, Defenbach told Keeton he thought the agreement not to assess fees until the litigation was over should be adhered to (R. 111). He then met with his committee and, following this, tendered \$3,750 to pay Mr. Etter's fee, alone. This was shortly after April 13, 1956, and was tendered pursuant to Mr. Etter's offer contained in his letter of April 13, 1956 (Ex. E; R. 140-141), hereinafter referred to. No costs were tendered because Keeton never billed Defenbach for them (R. 116). This testimony of Defenbach is bolstered by Mr. Keeton's admission that he advised Mr. Defenbach that no disbursements could be made unless Defenbach was successful in the insurance litigation and that the \$8,700 theretofore collected had to be used for the payment of tax liens (R. 127).

Regarding the conflict between his testimony and that of Keeton and Etter, Defenbach stated that Mr. Etter and Mr. Keeton were mistaken in their testimony that any conversations were had prior to the day of trial because Defenbach did not arrive in Spokane until late in the evening of October 17, 1955 and was not available until the following day. In his cross examination he again reiterated that there was never any personal discussion between him and Mr. Etter, nor any conversation in Mr. Etter's presence, concerning compensation of Keeton and Etter (R. 117).

The evidence discloses four opinions as to the reasonable value of the work done in the case up to and including June 7, 1956, which work included all work at the trial level and all proceedings necessary to perfect the appeal prior to service of appellant's brief (R. 143-144). Keeton's opinion was that a twenty-five per cent attorneys' fee was reasonable, but he admitted on cross examination that the trial took only one day (R. 55-56), from ten a.m. until three p.m., and that there was no motion to dismiss or pre-trial conference. (R. 57). Mr. Etter testified it was his opinion that twenty-five per cent of the recovery was a reasonable fee (R. 77). Del Cary Smith, a Spokane lawyer, testified to the same effect (R. 101), and Marcus Ware, an Idaho lawyer, testified that one-third would be reasonable. Meesrs. Ware and Smith testified on the basis of a hypothetical question which assumed that compensation for Defenbach, as trustee and Keeton and Etter, as attorneys, *was solely dependent upon success of the two insurance actions* (R. 91). On cross examination of Ware it was developed, and the record shows, that the government claimed less than \$36,000 (R. 130; Ex. C) and that there was \$8,700 in the estate before the actions were started (R. 105, 42). It was Mr. Ware's opinion on cross examination and in light of these additional facts that while all contingent fee cases should be on a one-third basis (R. 96), had Defenbach had available \$2,000 for fees and \$500 for costs, payable in any event, a fee of \$9,000 to \$13,000 would be warranted (R. 99).

As to the amount of work done by appellees, the case was tried on October 18, 1955 and took approximately

three hours of trial time. There was no motion to dismiss or pretrial conference (R. 56-7). The case evolved and turned on a pure question of law, rather than one of fact (R. 62). Keeton testified there were some background facts, which were never received in evidence in the former case, bearing on Weyen's intent (R. 63-4) but neither Mr. Etter nor Mr. Keeton was able to state any factual issues which were present and the record is devoid of any specific example of such factual issues. Keeton stated that he and Mr. Etter worked eight full days, over one hundred hours, in preparation of a written brief for the trial judge, which was called for after conclusion of the trial (R. 68). They also worked at night and they went all the way through "the trust law" and "West and other indexes."

"A. We looked through the trust law day and day out, through the West indexes and through all the other indexes to find *really the important case that this whole litigation hinged on*, and finally at the end found it under some place where we never expected to look under—insurance—and we really spent all that time trying to find a case relevant and close to this one to submit to the Judge in our brief. If we had found the case first, it would not have taken us so long, but we found the case last.

"Q. Then when you briefed the question under the subject of insurance and the assignability of insurance—

"A. Finally found it there, and then were able to prepare the brief in about one more day by looking through there." (R. 69)

Mr. Etter testified to approximately the same length of time and effort spent on the case. He stated:

"Q. In addition to the time spent in the actual trial of the case, Max, can you estimate for us the time

that you personally put in legal research that was required in various phases of this litigation?

"A. . . . I wired the West Publishing Company, who provide a service, and set up the facts in this case and asked them if they could advise us of any leading cases or cases that had recently come into the publishing company that would bear on this subject. I received a telegram back from the West Publishing Company citing the same cases that I had found that were on the trust end of it and that were on the matter of will construction, I think it was, and other matters of that kind, with a later letter from them also on phases of it that were not determinative of the controversy, and I wasn't satisfied . . ." (R. 74-5)

"

"So, finally, in going through the research, Mr. McKevitt, I went into insurance, and after being into the insurance for, about oh, 20 or 30 minutes, I came on to the case of *Massachusetts vs. California Bank*, I think in 187 Washington . . ." (R. 76)

"A . . . because state law governs, jurisdiction having been established, so then it became an easy matter to wind up in the afternoon, get it dictated and sent to Judge Driver. We had spent eight days and sent it the ninth day, or something like that. That was the conclusion of the work.

"A. We later then submitted that to other counsel and let them use it, and the Appellate Court decided on the same case. (R. 76-7)

"Q. The result of your labors?

"A. That's right." (R. 77)

The effect of the testimony of appellees is that they spent over one hundred hours working day and night to find a single Washington case, which they admitted was determinative (R. 69, 76).

Mr. Defenbach did not write any letters to appellees with regard to their compensation. As has been stated, all his dealings were with Mr. Keeton prior to trial, but certain letters were sent between Keeton and Etter, with copies to Mr. Defenbach, which are very significant. On March 26, 1956, Etter wrote to Keeton (Ex. E; R. 135) and admitted that no arrangement whatever had been made as to fees and suggested a cash payment of half of twenty per cent of the recovery, or \$6,000, plus \$7,500 for the pending appeal, plus an additional ten per cent if the appeal was successful. He asked Keeton to communicate this to Defenbach, which Keeton did by letter, on April 11, 1956 (Ex. E; R. 139). A copy of Etter's letter was enclosed. On April 13, 1956, Etter again wrote to Keeton. That letter read, in part:

"Consequently, I propose that in the event he will pay my fees on the present basis which I wrote about, I shall, and do hereby, agree to hold Mr. Defenbach harmless against the probability or actuality of him having to make good any part of the fees paid to me with the following exception. *It was my understanding that in any event we were to be paid a flat fee for this litigation—that is, the first Sun Life cases and the Maccabees case. I think that the flat guarantee to which we should be entitled for these cases, and the appeal, should be \$3750.00, plus costs and expenses in the event of ultimate loss.* Therefore, if Mr. Defenbach will pay me now, in accord with my letter to you, I would, as I have said, hold him harmless for any personal responsibility for any of the sums paid me as fees, minus, however, one-half of the agreed fee which I understand will be paid—win, lose or draw . . . " (R. 140-141; italics ours.)

Mr. Etter stated on cross examination that he had expected a minimum fee of \$3,750 for the trial of the cases (R. 79).

On June 1, 1956, Etter wrote to Defenbach. This was after Mr. Defenbach had agreed to pay \$3,750 for Mr. Etter's services (R. 113-114). In his letter of June 1 Mr. Etter stated that he had taken note of Mr. Defenbach's tender of \$3,750 and stated, "I advise you that your proposal is rejected." (R. 142) Etter then offered to settle for \$8,250, plus \$4,250 in costs and expenses for the appeal if hired to prosecute it, or, in the alternative, a contingent fee of \$6,000 for the appeal or, if he desired a straight contingent fee contract, then thirty per cent was agreeable.

On receipt of a copy of this letter Keeton wrote Defenbach on June 6, 1956 (Ex. B; R. 131) and stated, in part:

" . . . I feel that it was a mistake on the part of all parties to have entered into this litigation without some understanding in writing regarding the payment of attorney fees." (R. 133-134)

The effect of this letter was that appellees withdrew from the case.

SPECIFICATIONS OF ERROR

I

The Court erred in giving and making its Findings of Fact III, on February 8, 1957 (R. 26), as follows:

“That for all practical purposes the employment of said petitioners by said defendant was on the basis of a contingent fee, since it appears from the evidence introduced in said causes that said petitioners would not have been paid a flat fee if the litigation which they conducted had not terminated successfully.”

for the reason that said finding is not supported by the evidence.

II

The court erred in giving and making its Findings of Fact IV (R. 26), as follows:

“That the fair and reasonable value of the services rendered by said petitioners on behalf of the defendant, Ralph B. Defenbach, as Trustee, is the sum of \$15,000.00.”

for the reason that said finding is not supported by the evidence and is contrary to law.

III

The court erred in giving and making its Conclusion of Law I (R. 26), as follows:

“That petitioners are entitled to recover for their services the sum of \$15,000.00:”

for the reason that said Conclusion of Law is not supported by the evidence and is contrary to law.

IV

The court erred in entering its judgment dated February 8, 1957 (R. 28-29), wherein appellees were awarded \$15,000.00 as attorneys' fees for the reason that it is not supported by the evidence and is contrary to law.

ARGUMENT OF THE CASE

1. THE COURT ERRED IN FINDING THAT APPELLEES' EMPLOYMENT WAS ON A CONTINGENT FEE ARRANGEMENT (Specification of Error No. 1).

In its Finding of Fact No. III the court found that:

- (a) The employment was on the basis of a contingent fee;
- (b) Barring recovery in the suits involved, appellees would not have been paid a flat fee.

This finding is made in the face of the admissions by Mr. Keeton (R. 52) that there was no agreement as to fee and of Mr. Etter's correspondence wherein he stated:

"It was my understanding in any event we were to be paid a flat fee for this litigation—that the flat fee to which we should be entitled for these cases, and the appeal, *should be \$3,750, plus costs and expenses in event of ultimate loss . . .*" (Italics ours; Ex. E; R. 140-141)

In the same letter Mr. Etter referred to the agreed fee "which I understand will be paid—win, lose or draw". (Ex. E; R. 141).

A careful reading of Mr. Etter's letters (Ex. E; R. 135 to 144) completely negatives the proposition that counsel ever intended to be precluded from claiming a fee in the event the cases were lost. Mr. Keeton testified:

"Q. If the big case was lost, you hoped to still collect out of the estate, didn't you?

“A. If the government didn’t take it all.”

It should at all times be borne in mind that appellant had some \$8,700 (R. 105) of other moneys not involved in this litigation and that although liens of the United States government were claimed thereon an agreement had been worked out with the government that the funds could be used to prosecute the actions in which Messrs. Keeton and Etter were involved (R. 106-107), and that the funds were so used in the form of a tender of \$3,750 to Mr. Etter (R. 113) and to pay other counsel attorneys’ fees of \$2,500 and costs of \$500 for services on appeal to the Circuit Court of Appeals (R. 125).

From a reading of the entire record one can only conclude that there was never any intention, agreement or understanding limiting appellees to compensation for ultimate success in the actions in which they were engaged.

2. THE COURT ERRED IN FINDING THAT \$15,000 WAS REASONABLE COMPENSATION (Specifications of Error Nos. II, III and IV).

These specifications will be discussed together.

It is to be noted that the court does not fix the fee at \$15,000 on the basis of a contract but rather on the basis of a quantum meruit, but that it apparently justifies the allowance on the theory that appellees had precluded themselves from a fee unless a recovery was had. It is difficult for us to understand how a case which hinges on a single Washington case, which turns entirely on law and which was presented in less than a day, can warrant

such an allowance. We say this, even after making allowance for 100 hours of preparation and search for the controlling Washington decision, which they finally found.

The testimony of Mr. Ware and Mr. Smith is of no value in determining the question of a reasonable fee for the reason that the hypothetical question propounded assumed "that it was fully understood by defendant, Ralph B. Defenbach that the compensation, if any, for his attorneys would be completely dependent upon the outcome of the action above referred to, viz., that there would have to be a judgment of the above entitled Court, final after a possible appeal in favor of the defendant, Ralph B. Defenbach as Trustee" (R. 91). With the collapse of that hypothesis, their testimony is of no assistance to the Court. The same situation applies to the testimony of appellees, who both testified on direct examination that their compensation was dependent on a recovery in the actions which are the subject of this controversy but who both admitted on cross examination and by their correspondence that they fully expected to have a minimum fee, "win, lose or draw". Not only did they expect a flat, minimum or guaranteed fee, but they demanded the same.

An employment arrangement, to be binding, must be bi-lateral. Had the case been lost, on the present record it is quite apparent that appellees had not barred themselves from recovering a fee from appellant, either in his fiduciary capacity or in his personal capacity.

CONCLUSION

Accepting the testimony of appellees in its most favorable light, we submit that no agreement or understanding as to compensation was ever made between the parties; that the court erred in finding that there was an employment on a contingent fee basis; that appellees never gave up their right to claim compensation in the event the actions were lost; that appellees steadfastly maintained and asserted the right to some compensation, irrespective of the outcome of the cases; that in the light of the facts, the expert testimony is not applicable.

It follows, therefore, that this Court should either modify the judgment of the District Court or remand the matter for further proceedings consistent with the proposition that the fee to be allowed should be simply the reasonable value of the services rendered.

Respectfully submitted,

THOMAS MALOTT
SIDNEY SCHULEIN

Attorneys for Appellant

708 Spokane & Eastern Building
Spokane 1, Washington



No. 15515

IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

RALPH B. DEFENBACH,
as Trustee,

Appellant,

vs.

R. MAX ETTER and
PAUL C. KEETON,

Appellees.

*Appeal from the United States District Court
for the Eastern District of Washington,
Northern Division*

HON. SAM M. DRIVER, *Judge*

BRIEF OF APPELLEES

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Attorney for Appellees.

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JURISDICTION

Appellees accept the jurisdictional statement of the
appellant.

STATEMENT OF THE CASE

The appellees accept appellant's statement of the case, background facts, pleadings and proceedings.

ARGUMENT

In order to properly discuss appellant's assignments of errors it is deemed advisable to set out in their entirety the District Court's Findings of Fact and Conclusions of Law:

"PETITIONERS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter coming on for hearing before me on the 31st day of January, 1957, on petition of R. Max Etter and Paul C. Keeton to foreclose an attorneys' lien and to fix the amount of fees to which petitioners are entitled in causes Nos. 1308 and 1309 of the files and records of the above entitled Court. Petitioners appeared in person and were represented by their counsel, F. J. McKevitt. Defendant appeared in person and was represented by his attorney, Thomas Malott. The Court having heard the evidence of both parties and having considered the briefs filed by the respective parties in said causes and being fully advised in the premises, makes the following:

FINDINGS OF FACT

I

That defendant by stipulation made in open Court conceded the power of the Court to fore-

close said lien, and in his answer admitted his willingness and desire to have the Court determine the issues involved in the petition of petitioners. (R 25)

II

That without any specific contract as to attorneys' fees, petitioners for and on behalf of said defendant and at (23) his instance and request rendered legal services in causes Nos. 1308 and 1309 in the above entitled Court, in which causes the defendant, Ralph B. Defenbach, as Trustee, was successful.

III

That for all practical purposes the employment of said petitioners by said defendant was on the basis of a contingent fee, since it appears from the evidence introduced in said causes that said petitioners would not have been paid a flat fee if the litigation which they conducted had not terminated successfully.

IV

That the fair and reasonable value of the services rendered by said petitioners on behalf of the defendant, Ralph B. Defenbach, as Trustee, is the sum of \$15,000.00.

From the foregoing Finds of Fact the Court makes the following:

CONCLUSIONS OF LAW

I

That petitioners are entitled to recover for their services the sum of \$15,000.00. (R. 26)

Done in open Court this 8th day of February, 1957.

(s) SAM M. DRIVER,
Judge.

Presented by Attorney:

(s) F. J. McKEVITT (R. 27)

Preliminary to such discussion the attention of this Honorable Court is invited to Rule 52 (a) of the Rules of Civil Procedure. That rule, among other things, prescribes that the Findings of Fact in actions tried without a jury

“shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.”

ANSWER TO SPECIFICATION OF ERROR No. 1

That specification calls into question Finding of Fact No. III of the District Court reading as follows:

“That for all practical purposes the employment of said petitioners by said defendant was on the basis of a contingent fee, since it appears from the evidence introduced in said causes that said petitioners would not have been paid a flat fee if the litigation which they conducted had not terminated successfully.” (R. 26)

The attention of the Court is directed to appellant's Statement of Points, reading as follows:

“STATEMENT OF POINTS

To the above entitled Court and to Stanley D. Taylor, Clerk thereof, and to R. Max Etter and Paul C. Keeton and Francis J. McKevitt, your attorney:

You are hereby notified that the following is a statement of points upon which the appellant, Ralph B. Defenbach, as trustee, will rely on his appeal to the Court of Appeals for the Ninth Circuit:

1. Fifteen thousand dollars (\$15,000.00) is excessive compensation for the services of petitioning attorneys in these proceedings.

2. The trial court erred in finding that \$15,000.00 was reasonable compensation for such services.

3. The trial court erred in entering judgment for \$15,000.00 as compensation for such services.

Dated this 9th day of April, 1957.

(s) THOMAS MALOTT,
Attorney for Defendant. (163)”
(R. 145)

It will be observed that appellant's Specification of Error No. 3 is not included within the statement of points. Appellees urge that such failure is a violation of Rule 19, Sub-paragraph 6 of the Rules of this Court, the applicable portions of which are as follows:

“In all cases * * * the appellant, * * * upon the filing of the record in this court, shall file with

the clerk a concise statement of the points on which he intends to rely. With such statement the appellant * * * shall file a designation of all the record which is material to the consideration of the appeal or review and forthwith serve on the adverse party a copy of the designation. * * * If parts of the record shall be so designated by one or both parties, or if such parts be distinctly designated by stipulation of counsel for the respective parties, the clerk shall print those parts only; and the court will consider nothing but those parts of the record and the *points so stated.*" (Emphasis supplied)

In this connection see also:

Bank of America National Trust & Savings Assn. v. Commissioner of Internal Revenue, 126 F. 2d p. 48 (Ninth Circuit);

Western National Insurance Co. v. LeClare, 163 F. 2d 337 (Ninth Circuit);

United States v. Gallagher, 151 F. 2d 556 (Ninth Circuit).

In any event there is ample evidence in the record justifying such a finding.

The attention of the Court is directed to the testimony of appellee, Paul C. Keeton, which the District Court accepted as correct:

"Q. Now, do you recall then when, if there was, the first meeting in which Mr. Defenbach and yourself and Mr. Etter were present in connection with this litigation?

A. No, I'm not sure of the first time. I can tell you one of the times, which would have been the 17th day of October of 1955.

Q. Well, prior to that time, had there been any discussion (48) between Mr. Defenbach and yourself concerning attorney fees?

A. Yes, I discussed it with Mr. Defenbach. (R. 45)

Q. And what was the result of that discussion? What did you say to him and the substance and what did he say to you?

A. Well, Mr. Defenbach told me on many occasions that his position was a very vague one; that he didn't know what he could do with the approximately \$8,000 that he had on hand. There were 40,000, or in that neighborhood, of tax liens.

Q. State and Federal?

A. State and—

MR. MALOTT: Pardon me, are you narrating conversation or giving background? I don't care, but I wish you would distinguish.

A. I am narrating conversation.

MR. MALOTT: Okay.

A. Mr. Defenbach and I discussed the tax liens which were on this money, aggregating, I think, 36,000 plus, for sure—in fact, I have them all here, the tax liens; that also Mr. Weyen had been accused by the Federal Gov-

ernment of a timber trespass and both Mr. Defenbach and I had been warned by the United States Attorney that they claimed a priority on any moneys in this creditors' pool first, and also the United States Attorney advised Mr. Defenbach by letter that he would hold Mr. Defenbach personally liable if he paid out any creditors or anybody ahead of the U. S. Government on both the tax liens and the timber trespass, and I have his letter right here, if you would like to see it.

Q. (By Mr. McKevitt): Well, at any time then and because of his feeling in that regard, did he advance you any moneys of any kind or character by way of expense or anything else? (R. 46)

A. He did not.

THE COURT: I don't think it makes any difference, probably, but is that the United States Attorney for the District of Idaho?

A. Yes, sir.

THE COURT: Yes, all right.

Q. (By Mr. McKevitt): Do you have a copy of that letter?

THE COURT: I don't care to see the letter, I just was curious to know whether it was this office or the Idaho office. It doesn't make any difference.

MR. McKEVITT: It is a very peremptory demand—I don't mean peremptory, but I mean very indicative of their position.

THE WITNESS: I might state one more thing, Mr. McKevitt.

Q. Go ahead.

A. Regarding the holding of the moneys in the fund, immediately after Mr. Weyen's death, the Bureau of Internal Revenue notified Mr. Defenbach that they were going to go back several years and audit Mr. Weyen's tax returns for income tax assessments or violation and that he would have to impound all of his records and hold all of his records together undisturbed, so to speak. So Mr. Defenbach rented an office in the same building that my office is in, these records were impounded in that building, and on account of the letter which Mr. Defenbach is looking at now, no moneys were (R. 47) paid out on that office for rent, which was accruing at the rate of \$25 per month, for eleven and one-fifth months.

Q. And while we are on that subject, is it not the fact that the payment was finally made after the entry of judgment in this court; is that true?

A. The payment of the rent was made three and a half months after the entry of the judgment in this Court on March 14, 1956. There is the receipt for the rent (indicating).

Q. Well, now, can that chronologically bring us down to a meeting then had between yourself and Mr. Etter and Mr. Defenbach?

A. Yes.

Q. All right, tell the Court about that.

A. Well, I had had discussions, as I said, with Mr. Defenbach about what to do with the 8,000 some odd dollars there were on hand on numerous occasions. He told me that until his position was clarified, he wasn't going to do anything with it or pay it out at all, because the government might consider him what they call a transferee and also—

MR. MALOTT: Pardon me, Mr. Keeton, are you now narrating, telling of the conversation in Mr. Etter's office?

A. No, I am not.

MR. MALOTT: I think that was the question.

A. It is not responsive, I will answer it.

MR. MALOTT: I don't want to be technical, but I am trying to distinguish between conversations and background. (R. 48)

MR. McKEVITT: I see.

MR. MALOTT: That is what I am trying to do.

THE COURT: That was just introductory, probably. Your question called for conversation in Mr. Etter's office.

MR. McKEVITT: Well, I don't know whether it was in Mr. Etter's office, but where the three of them were present. I think the three were in Spokane.

A. All right, there were three—

MR. MALOTT: Pardon me, if you will just try to distinguish. I have no objection to giving background if you try to distinguish between background and direct conversation.

A. I will tell the time and place of each conversation.

MR. MALOTT: Yes.

A. The day before the trial on October 17th of 1955, Mr. Defenbach had come from Lewiston and so had I and we were over in the Ridpath Hotel. At that time I told Mr. Defenbach that I had prepared a letter that I was going to give him concerning a fee arrangement in this case, as we had had none so far. He told me that it would be no use because he felt that he had no authority whatsoever to make any fee in the case; there would be no use to talk with him about any agreement or any fees in the case.

And I went over to Mr. Etter's office and told that to Mr. Etter, and he came back with me to the hotel. (R. 49)

Q. (By Mr. McKevitt): Well, maybe we haven't established when Mr. Etter definitely came into the litigation after the interpleader action was filed.

A. Mr. Etter came into the litigation on 7-25-55.

* * * *

Q. (By Mr. McKevitt): Now, with reference to any meeting that was had between you and Mr. Etter and Mr. Defenbach and pertaining to this litigation, when did you say that took place and where?

A. Well, it took place the night before the trial on the 17th in the Ridpath Hotel.

Q. Three of you present?

A. Three of us present.

Q. Was there a fee discussion, a discussion about fees?

A. Yes, I had been to Mr. Etter's office and told him that—

MR. MALOTT: Pardon me, I wish you would try to stick to the discussion.

A. Yes, there was a discussion about fees at that time.

Q. (By Mr. McKevitt): The three of you there?

A. Yes.

Q. What was that discussion? What was said?
(R. 50)

A. Well, Mr. Defenbach said that on account of the tax liens on various restraints that were put on that, that he would not be able to pay any fees at that time.

Q. And was he concerned at all about any information he had received from the Federal Government about possible personal liability on his part?

A. Yes, he was.

Q. Is that referred to in this letter of November 16, 1955, to Mr. Defenbach from the United States Attorney in Boise?

A. That's right.

Q. Well, now, in this conversation in this meeting here in Spokane, did Mr. Etter make any observation to Mr. Defenbach about fees?

A. Well, Mr. Etter wanted a retainer fee on the case. He asked Mr. Defenbach for a retainer fee on the case, and Mr. Defenbach explained, as I have said, that he would not pay any of this money out on account of the fact of all these prior claims, and also that under the Defenbach Trustment agreement of November 15th—

Q. 1954.

A. —1954, in that agreement the government has a priority to any moneys that come into the pool. So Mr. Etter at that time said: 'Well, under those circumstances, we take these cases on a contingent fee or handle them on a contingent fee.'

Q. Did Mr. Etter make any observation as to the amount of the contingent fee?

A. He talked about percentages, yes. He talked about 25 per cent if settled, 30 per cent if tried, (R. 51) and 40 per cent if appealed, and Mr. Defenbach said that he could not agree to anything.

Q. Well, did he say anything with reference to the reasonableness or unreasonableness of such

an arrangement if he had been able to enter into it?

A. He said—

MR. MALOTT: Objected to, if the Court please, if it is for the purpose of proving a contract.

THE COURT: No—

MR. McKEVITT: No, it isn't for the purpose of proving a contract.

MR. MALOTT: The witness is not an expert on the thing and his opinion would not—

THE COURT: Well, it might be an admission against interest. I will let him answer.

MR. McKEVITT: My position was, accepting this to be true, that it showed that he considered at that time the fee to be reasonable. That is my purpose, your Honor.

THE COURT: I see.

A. He said that he had no objection to that type of arrangement, but, however, he would not agree to it.

Q. Is that where the matter then was left standing so far as fees were concerned?

A. That was where the matter was left standing.”
(R. 52)

Appellee Etter in this connection testified as follows:

“Q. Now, Mr. Etter, I want to ask you this one question particularly with reference to this conversation that Mr. Keeton spoke about in Spokane where the three of you were present and the fee discussion was had. Will you tell the Court what took place in your recollection?

A. As close as I can remember—I talked with Mr. Malott at the recess—there is probably some question as to whether the conversation took place in the Ridpath or in my office or partly in both, and, as I recall, we discussed the case both places, over in my office and later when we went over to the Ridpath Hotel. The three of us were together at every time, so I would say that the discussion was either in the office or in the hotel or half in one and half in the other, as I recollect it.

I had talked, I think, with Mr. Defenbach at one time before. I just think that, although I may be in error. It might be that I corresponded with him through Mr. Keeton, I'm not sure of that, but the definite one that I remember is the day prior to trial when we had a discussion about fees.

Q. The contents of that was what?

A. Beg your pardon?

Q. Give us that discussion.

A. Mr. Keeton came over and told me—I had asked Mr. Keeton to get some arrangement with Mr. Defenbach and I told him that I should like to have it on at least a partly retainer basis. Mr. Keeton came over and told me he had talked with Mr. Defenbach about

it and hadn't reached any agreement and would I talk to Mr. Defenbach, or they both came over together, but in any event I had made a proposal on fees before and I repeated it generally to Mr. Defenbach. I had suggested if (R. 71) he wanted us to try this case, take it up on through appeal, that if he was willing to pay a retainer of \$2,000, it would be acceptable through the courts on a prescribed fee of 20 or 30 per cent.

And he said that he was unable to pay any retainer at all, and during the course of the conversation we discussed the matter of retainers, and I said it was a practice, at least in Spokane as I understood it, to provide for a retainer in possibly three different grades; one of 25 per cent, one of 30 and one of 40. I explained to him our practice here on contingent fees; that if there were advance payments made for costs and probably was settled without litigation, it would be 25 per cent, unless there was some provisions made for some type of a retainer.

Mr. Defenbach explained to me that he wouldn't be able to pay anything, then or on appeal. In fact when I questioned him, he told me that if we should lose or if there was some necessity for appellate procedure, that he still couldn't pay anything and that it would be incumbent on the attorneys to assume all of the costs of the litigation and the costs of the appeal and all of the rest of it, which I knew to be in a considerable amount, assuming we had to go to the Appellate Court in San Francisco.

I didn't care for that arrangement, I'll be frank to say, and I said so, but I told him that as long as we were in the case, we would

try it out on that basis. When I explained to him what these matters (R. 72) of contingency were, he said as far as the proposals were concerned, they were reasonable, but that he could not agree to them and that was that.

That was just about the situation. There was no objection. He didn't say, as Mr. Keeton said, exactly that he had no objection; he said as far as he was concerned, that appeared to be a reasonable basis, but he was unable to agree to pay anything, that he would just have to take it and catch as catch can, as a matter of fact, and if we lost in the lower court and we wanted to go to the Appellate Court, that was up to us.

Q. You are speaking now about these percentage proposals?

A. That is correct, that is correct.

Q. Do I understand it is your testimony that he said he could see nothing objectionable to them?

A. That is substantially it.

Q. He considered it a reasonable fee under ordinary circumstances?

A. I shouldn't say I assumed it, but he had no objection and, in fact, we had a very pleasant conversation. He made his position clear that he couldn't pay and, although I was disappointed—I hate to take a case on that type arrangement—we agreed that we would do it, that was it.

Q. Was it your feeling at that time from your knowledge of the whole situation that unless there was a successful outcome to this suit here and above, that you and Mr. Keeton would be out your time and out of pocket?
(R. 73)

A. Absolutely. * * *'' (R. 74)

This Court will keep in mind that the testimony of appellees above set forth dealt with meetings and conversations with appellant prior to the trial of the interpleader action out of which the claim of appellees for attorneys' fees arose.

That appellant would not agree to an attorneys' fee of any kind or character until after there had been a successful determination of the interpleader actions in which, in his capacity as a Trustee, he was named as a defendant, is borne out by the following testimony:

“Q. Did you have any discussion at all with Mr. Etter at any time or any place prior to the lawsuit about fees?

A. No, sir.

Q. And you never received any letter of any kind or character from Mr. Etter prior to the lawsuit about fees?

A. No.

Q. Nothing said about a retainer?

A. No, sir. (R. 117)

* * *

Q. Now, it is a fact it wasn't until after you knew of the existence of that check made jointly payable to you and your attorneys that you first took any interest so far as attorneys fees or expenses of this litigation were concerned; that is correct, isn't it?

A. Well, word it differently.

Q. Pardon me?

A. Word it differently. Word it that I didn't make any expenditures.

Q. In other words, is it your position that you wouldn't discuss attorney fees or expenses of this litigation of any kind or character until this lawsuit in this Federal Court here was determined; is that your testimony?

A. My testimony would be that it was agreed between Mr. Keeton and myself that we would wait until the final settlement of this, which he told me would be in the District Court in Nez Perce County, (R. 118) and he was going to petition for a declaratory judgment in Nez Perce County and at that point—

Q. Mr. Keeton told you he was going to petition Nez Perce Idaho County Court for a declaratory judgment?

A. Yes, sir." (R. 119)

Mr. Keeton categorically denied that he ever had a conversation with appellant regarding a declaratory judgment action in Idaho after the entry of judgment in appellant's favor in the interpleader action. (R. 126-127)

Again appellant urges upon this Court that the District Court erred in making Finding of Fact No. 3 by virtue of a letter written by appellee Etter on March 26, 1956. (Ex. E; R. 135-138) This Court will keep in mind that this letter was written subsequent to the entry of judgment in appellant's favor in the interpleader action on December 30, 1955.

On page 20 of his brief and in connection with this letter appellant makes the following observation:

"A careful reading of Mr. Etter's letters (Ex. E; R. 135-144) completely negatives the proposition that counsel ever intended to be precluded from claiming a fee in the event the cases were lost."

Examination of the exhibit above referred to does not bear out appellant's interpretation of the same.

The following portion of the letter of March 26, 1956, (R. 138) gives ample support to Finding of Fact No. 3:

"Now it seems that this whole matter of payment to the attorneys must remain in some kind

of a 'limbo' the end result of which none can foresee, but with the apparent feeling that the attorneys will continue all of the litigation *with no understanding at all as to any compensation from any source.*" (Italics supplied)

Answer to Specifications of Error Nos. I, II and IV.

The above specifications of error were the only specifications that were included in appellant's Statement of Points. They may be discussed together since they involve the single question as to whether under all of the facts in the case the allowance of a \$15,000 fee was a proper one.

In opening his discussion of these specifications appellant states:

"It is to be noted that the court does not fix the fee at \$15,000 on the basis of a contract but rather on the basis of a quantum meruit, but that it apparently justifies the allowance on the theory that appellees had precluded themselves from a fee unless a recovery was had." (Br. 21)

In this connection the Court's attention is invited to the following portion of the record:

"THE COURT: Well, I just wanted to ask this question: Is the issue here merely the amount of the attorney fees, or do you question the plaintiffs' right to collect any attorney fee?"

MR. MALOTT: No question. No, we submit that an (R. 32) attorney fee should be fixed and we are just as anxious—

THE COURT: Do you both agree on the basis of what is a reasonable fee for the services rendered?

MR. MALOTT: I think not. I think there is quite a sharp conflict as to the basis, as to whether it is a contractual fee or whether it is quantum meruit.

THE COURT: Is it a claimed contractual fee?

MR. McKEVITT: We have alleged, as we are permitted to do, as your Honor well knows, in the petition that the amount which they are seeking to recover, Mr. Keeton and Mr. Etter, some \$16,500, I believe, was the agreed and reasonable value of the service. However, I will say at the outset now that we are not in a position to establish a definite contract between these attorneys and Mr. Defenbach as to any fee, contingent or otherwise, and we are here on the basis that this amount of \$16,500 is a reasonable fee, under all the circumstances, to be allowed." (R. 33)

Again, at page 78 of the Record: (Cross examination of Appellee Etter)

"Q. I believe you stated on your direct examination that was always your understanding, you would not be paid anything unless you won the case?

A. That's right.

Q. But I draw your attention to your letter of June 1st to Mr. Defenbach, just asking you to refresh your recollection; copy of your letter of April 13, 1956, I am drawing your attention to that, copy of which was sent to Mr. Defenbach and in part in which again you are writing on the subject of getting this fee matter straightened out, in which you say in part:

'It was my understanding that, in any event we were to be paid a flat fee for this litigation; that is, the first Sun Life cases and the Macabees case.'

A. Yes. (R. 78)

Q. Doesn't that bring anything to mind on the thing?

A. It brings to mind a flat fee basis on his arrangement, that what we were doing was a reasonable fee. There was no guarantee of any money at all. I think you can read later there that I think the flat guarantee to which we should be entitled in the fees should be \$3750. He hadn't guaranteed us anything, that is why I wrote the letter.

Q. I ask you, in saying this, you say in part: 'It was my understanding that, in any event, we were to get a flat fee.'

A. By way of a contingent basis, exactly. We were never guaranteed one penny.

Q. By flat fee, you didn't mean contingent fee?

A. I was referring there to his arrangement. He thought it was agreeable, he never agreed to pay anything.

Q. All right.

A. Later on, counsel who he employed took that same position with me, that he had never agreed to pay us a cent.

Q. (Reading): 'I think that the flat guarantee to which we should be entitled for these cases and on the appeal should be \$3750, plus costs and expenses.'

A. That's right, that is what I said. That is what I said. Doesn't say there that he agreed to pay it.

Q. Oh, no.

A. No. (R. 79)

Q. But you say it is your understanding that you would get a flat fee in any event.

MR. KEETON: Win, lose, or draw.

A. No, there was no understanding of that kind. If you construe it that way, you may do so, but there wasn't.

Q. I am just asking what you meant?

A. No, there wasn't—

MR. McKEVITT: May I inquire, if your Honor please, if this line of examination is being conducted for the purpose of showing that there had been a contract arrangement between these men and Defenbach?

MR. MALOTT: Apparently, yes, I think that may well be. I am trying to find out what the agreement is. This is cross examination.

THE COURT: Is it your position that there was a contract for a flat fee?

MR. MALOTT: No, your Honor, just taking the position that there was always an agreement, understanding made with Mr. Keeton that there would be a fee paid at the conclusion of the case; wait until they saw what had happened and then fix it accordingly.

MR. McKEVITT: I want to be clear if he is relying on these letters as constituting a contract. I am not clear on it, but if he is, I would object on the ground he hasn't pleaded it in his answer.

THE COURT: I don't think he is relying on a contract.

MR. MALOTT: Thus far, Mr. McKevitt I was just cross examining, I haven't put on my own case.

THE WITNESS: You see, Mr. Malott, I never received any answer to any of these letters to Mr. Defenbach. He never answered me at all.

MR. MALOTT: I realize that." (R. 81)

Four witnesses testified as to the value of the services rendered by appellees: Appellee Keeton, 25% of the recovery (R. 56); Etter, 25% (R. 77); Idaho Attorney Marcus J. Ware, 33 1/3% (R. 94); and Spokane Attorney Del Cary Smith, not less than 25% (R. 101).

Attorney Marcus J. Ware had thirty years experience covering practice in the state and Federal courts

in Idaho and the state courts in Washington. The testimony of both disinterested witnesses was based upon a lengthy hypothetical question. (R. 83-94). In answer to the hypothetical question, the witness Ware, among other things, testified as follows:

“Q. In arriving at that opinion, I will inquire if you had occasion to make a study of your own bar schedules, the bar schedule of Asotin County and the bar schedule of Spokane County?

A. Yes, I am familiar with the bar schedules.”
(R. 94)

The experience of witness Del Cary Smith extended over a period of thirty years. He had practiced in the state and Federal courts of Washington and Idaho and is admitted to practice in the Federal Courts of Washington, Idaho, California and this Court. At one time he was a member of the Prosecutor's staff of Spokane County. He is a past President of the Spokane County Bar, the State Bar of Washington and a past Member of the Board of Governors of the State Bar of Washington.

As seen from the hypothetical question, in addition to the judgment sum of \$66,134.94 in the interpleader cases (R. 93), and through the efforts of appellee Keeton, the Defenbach Trustee Fund was further enriched by the sum of \$7500 collected by said appellee from the Mutual Benefit Association of Omaha (R. 41-42-87)

Realizing the probative value of the testimony of these two disinterested lawyers, appellant seeks to completely destroy the same in this fashion:

“The testimony of Mr. Ware and Mr. Smith is of no value in determining the question of a reasonable fee for the reason that the hypothetical question propounded assumed ‘That it was fully understood by the defendant, Ralph B. Defenbach, that the compensation, if any, for his attorneys, Paul C. Keeton and R. Max Etter, and compensation for himself as Trustee under the Assignment of November 16, 1954, would be completely dependent upon the outcome of the action above referred to, viz: that there would have to be a judgment of the above entitled Court, final after a possible appeal in favor of the defendant, Ralph B. Defenbach as Trustee.’ With the collapse of that hypothesis their testimony is of no assistance to the court.”

In other portions of the record lifted out of context appellant seeks to destroy the testimony of appellees to the effect that any compensation for their services would be completely dependent upon the successful outcome of the interpleader actions.

The logical conclusion to be drawn from the whole record, and particularly the testimony of Mr. Defenbach, is that he attempted as far as possible to hold petitioners at bay insofar as fees were concerned, with the idea in mind that if the interpleader action went against him that appellees, Keeton and Etter, if this Court will pardon the expression, would be left “hold-

ing the bag'', while if it were successful and he could hold their fees down to an amount less than what they were demanding, the benefits thereof would quite possibly redound in part to himself and to others who had exerted no effort in enriching the Trustee fund.

Because of the inability of appellees to get any commitment from appellant as to attorneys' fees appellees withdrew from the prosecution of the appeal taken to this Court by the other defendants in the interpleader actions. Appellant, however, was quite agreeable to paying substituted counsel a \$2500 fee plus \$500 expenses for the prosecution of his appeal. (R. 124-126, inc.) This in the face of the admitted fact that the real labor, so far as the legal questions involved were concerned, had already been performed by appellees and made the task of the substituted counsel a comparatively simple one. On this point and on re-cross examination the appellant testified as follows:

“Q. (By Mr. McKevitt): How much did you pay that firm altogether now? Was it \$3,000?

A. \$3,000.

Q. And can you break that down, attorney's fees and expense?

A. \$2,500 fees and \$500 expenses.

Q. And—

A. They told me that they didn't think the expenses would run \$500 and I would be getting a refund one of these days.

Q. And he told you the reason he didn't want to appear in your behalf in this case is because he had used certain files that Mr. Etter had in his office? (R. 125)

A. No, he didn't say that.

Q. Well, you know that what he had used was the material that Etter had collected and Keeton in this Court so far as the legal cases were involved; you knew that, didn't you?

A. Yes, I knew that." (R. 126)

In determining, what appellant overlooks, the fee that should be allowed appellees, District Judge Driver was in the advantageous position of having been the trial Court in the interpleader actions; thus he was not a stranger to the nature, kind and character of the services rendered by appellees.

Appellees feel that where the responsibility is cast upon a trial Court to establish the reasonable value of an attorney's services it is incumbent upon counsel for the respective parties to assist as much as possible the Court in reaching a proper determination. It was for this reason that reputable and experienced attorneys were called as experts in behalf of appellees. Since the reasonableness of the fee demanded by them was the sole question before the District

Court, the appellees feel it was the plain duty of appellant to produce testimony from lawyers of equal standing to counter the contention of the appellees and their witnesses. Perhaps in the reply brief some reason will be assigned for failure on the part of appellant to discharge this plain duty.

In order to assist, as far as possible, the District Court in arriving at the proper determination of the issue involved, the following proceedings took place:

“MR. McKEVITT: I think what I would like to do at this time on this matter of fees, I would just like to leave with your Honor this Journal of the American Judicature of October and December, 1956, New York contingent fee schedule. It may be helpful and—

THE COURT: Have you seen this thing?

MR. MALOTT: No.

THE COURT: I have heard about it.

MR. McKEVITT: I will leave it with your Honor.” (R. 129)

The issue above referred to contained an article with reference to the adoption of the schedule of contingent fees by Judicial Districts in the State of New York, which fee schedule was adopted as the result of an intensive study made under the direction of the Courts. That schedule follows:

50% of the first \$1000
40% of the next \$2000
35% of the next \$22,000
20% of the next \$25,000
15% of any sum over \$50,000.

This schedule was comprehensive of all types of personal injury cases, simple of investigation, simple in facts, cases of involved facts and involved conclusions of law, etc. While the action out of which the instant proceedings arose was not a personal injury one, it is felt that this is a distinction without a difference. The New York Courts must have had in mind in adopting this schedule the physical disabilities under which the claimants would have to labor. On the basis of such a schedule petitioners in this case would be entitled to \$16,420.00.

AUTHORITIES

The attention of this Honorable Court has already been directed to Rule 52 (a) of Federal Rules of Civil Procedure.

The appellees contend that the findings of the trial Court are supported by ample evidence and are not subject to review in this Court. See

District of Columbia v. Pace, 320 US 698, 88 L. ed 408, 64 S. Ct. 406;

Adamson v. Gilliland, 242 US 350, 353, 61 L. ed 356, 357, 37 S. Ct. 169;

Morewood v. Enequist, 23 How (US) 491, 16 L. ed 516;

Zeckendorf v. Johnson, 123 US 617, 31 L. ed 277, 8 S. Ct. 261;

Lawson v. United States Min. Co. 207 US 1, 52 L. ed 65, 28 S. Ct. 15;

Cook v. Robinson, 194 F. 753; (CAA 9th);

Cranor v. Gonzales, 226 F. 83, at 94. (CCA 9th).

In the *Cook* case, *supra*, an action tried to the District Court of the United States for the Fourth Division of the Territory of Alaska, this Court on appeal had this to say:

“The third contention relates to the findings of the court. The case having been tried without the intervention of a jury, the court’s findings are conclusive of the questions of fact, unless it

be that there is no evidence to support them. The rule is that the findings of fact of the court, whether special or general, will not be disturbed if there is *any evidence* (italics supplied) upon which such findings could be made. (Citing cases.) It is not contended that the conclusions of law should have been different upon the facts found, but that the facts found are not supported by the evidence."

In the *Cranor case*, *supra*, a habeas corpus proceedings, this Court remarked:

"Since for the reasons indicated the district court here properly entertained and heard the application of Gonzales for a writ of habeas corpus, Rule 52 (a), Fed. Rules Civ. Proc. 28 U.S.C.A. prohibits us from disturbing the findings made by that court unless they are clearly erroneous; that they are not so erroneous must be manifest when it is borne in mind that the trial judge heard and observed the witnesses and noted their demeanor and manner of testifying, and had full opportunity to judge of the probability of their respective stories and to arrive at a conclusion as to the credibility of those who testified before him." (At page 94)

Appellant totally failed to produce any testimony as to what the services of appellees were worth. He has failed to advise this Court as to what extent, if any, the judgment should be modified; he has failed to indicate by what amount, if any, the fee allowance was either excessive or unconscionable. He has submitted not one single authority in support of his position. He has compelled the appellees to file liens

against the judgment procured in his favor. He has compelled them to employ counsel to represent them in the District Court and on this appeal.

We sincerely urge that this appeal is totally without merit and that by such course of conduct appellant has brought himself within the purview of subdivision 2 of Rule 26 of the Rules of this Court reading as follows:

“In actions at law where an appeal shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out merely for delay, damages at a rate not exceeding 10 per cent, in addition to interest, shall be awarded upon the amount of judgment.”

It is respectfully submitted that this appeal be dismissed, that the judgment of the lower Court be affirmed, and that the provisions of Rule 26 be invoked against appellant.

Respectfully submitted,

F. J. McKEVITT,

Attorney for Appellees

711 Old National Bank Bldg.,
Spokane 1, Washington.

Nos. 15516-15519

**United States
Court of Appeals**
for the Ninth Circuit

KEITH C. MORTON,

Appellant,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,
Appellee.

ROBERT E. KUNTZ,

Appellant,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,
Appellee.

GENE A. PICOTTE,

Appellant,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,
Appellee.

JOHN S. MAHAN,

Appellant,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,
Appellee.

Transcript of Record

**Appeals from the United States District Court,
for the District of Montana.**

FILED



Nos. 15516-15519

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**Appeals from the United States District Court,
for the District of Montana.**



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Billings, Montana;

ROBERT P. DAVIDSON,

400 Midland Bank Bldg.,

Billings, Montana;

M. L. COUNTRYMAN, JR.,

Legal Dept., N. P. Ry. Co.,

St. Paul Minnesota,

Attorneys for Respondent-Appellee.

In the District Court of the United States, in and
for the District of Montana, Billings Division

No. 1794

STATE OF MONTANA, Ex Rel., KEITH C.
MORTON,

Relator,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Respondent.

PETITION FOR REMOVAL

Comes now the respondent, and, for its petition to remove the above-entitled action or proceeding from the District Court of the First Judicial District of the State of Montana, in and for the County of Lewis & Clark, to the above-entitled court, alleges:

I.

That on or about November 19, 1955, relator commenced the above-entitled action or proceeding by filing the initial pleadings in the District Court of the First Judicial District of the State of Montana, in and for the County of Lewis & Clark; that on November 19, 1955, relator caused to be served in Lewis & Clark County, Montana, upon H. R. Cumming, an agent of respondent, copy of an affidavit and application for writ of mandamus, copy of which is attached hereto marked Exhibit "A," copy of an order granting alternative writ of mandamus,

copy of which is attached hereto marked Exhibit "B," and copy of an alternative writ of mandamus, copy of which is attached hereto marked Exhibit "C"; that by said action or proceeding, the relator seeks a writ of mandate compelling the respondent to convey in fee to an individual, Keith C. Morton, by a good and sufficient conveyance, all of the title of respondent to that certain land located in McCone County, Montana, and described as follows:

The Northwest Quarter of Section Thirty-five, Township Twenty-two North, Range Forty-eight East, M.P.M., McCone County, Montana:

that said application requests that respondent accept in return in consideration the sum of \$2.50 per acre for said real estate; that the individual, Keith C. Morton, is the sole beneficiary of the relief prayed for, and the sole party to whom it is claimed in the pleadings respondent is required to execute the conveyance; that the State of Montana has no beneficial interest in the litigation, and does not seek and cannot be granted in the proceeding any relief.

II.

That the relator, Keith C. Morton, as an individual, claims to be entitled to the relief prayed for under a proper interpretation of the terms and provisions of the Act of Congress of the United States of 1864, 13 Statutes at Large, page 365, and under the terms and provisions of that certain Joint Resolution of the Congress of the United States of May

31, 1870, 16 Statutes at Large, page 378, and under the terms and provisions of the land laws and homestead laws of the United States of America, 43 U.S.C.A., Chapter 7; that in consequence the matter in controversy arises under the laws of the United States.

III.

That at all times herein mentioned, Keith C. Morton has been, and now is, a citizen and resident of the State of Montana; that at all times herein mentioned the respondent has been, and now is, a corporation organized and existing under and by virtue of the laws of the State of Wisconsin; that the action or proceeding presents a controversy between citizens of different states.

IV.

That at the time of the commencement of the action or proceeding, and at all times since, the sum or value of the real property involved, and of the matter in controversy, exceeds the sum or value of \$3,000.00, exclusive of interest and costs.

V.

That petitioner submits herewith a bond with good and sufficient surety in the sum of \$500.00 conditioned as required by Section 1446 (d), Title 28, U.S.C.A.

Wherefore, under the provisions of Sections 1331, 1332 and 1441, Title 28, U.S.C.A., petitioner re-

quests the above-entitled court to accept jurisdiction over this controversy.

COLEMAN, JAMESON &
LAMEY,

By /s/ COLE CROWLEY,
Attorneys for Respondent.

Duly verified.

M. L. COUNTRYMAN, JR.,
ROBERT P. DAVIDSON,
Of Counsel for Respondent.

EXHIBIT A

In the District Court of the First Judicial District
of the State of Montana, in and for the County
of Lewis and Clark

STATE OF MONTANA, Ex Rel., KEITH C.
MORTON,

Relator,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Respondent.

AFFIDAVIT AND APPLICATION FOR WRIT OF MANDAMUS

State of Montana,
County of Lewis and Clark—ss.

Ralph J. Anderson, being first duly sworn upon
oath, deposes and says:

I.

That he is the attorney for the relator above named; that he makes this affidavit and application as such attorney for and on behalf of said relator for the reason that said relator does not reside in and is not now in the County of Lewis and Clark wherein affiant resides and has his office and for the reason that he is more familiar with the facts herein stated than is the relator above named.

II.

That the respondent Northern Pacific Railway Company is a corporation created, organized and existing under and by virtue of the Laws of the State of Wisconsin.

III.

That the said Northern Pacific Railway Company is now and for some time prior hereto was the owner of and entitled to the possession of certain lands and premises located in McCone County, Montana, and more particularly described as follows, to wit:

The Northwest Quarter of Section Thirty-five, Township Twenty-two North, Range Forty-eight East, M.P.M. McCone County, Montana.

IV.

That the said lands hereinabove described were granted to the predecessor of the respondent Northern Pacific Railway Company, the Northern Pacific Railroad Company, which was a corporation created by and pursuant to an Act of the Congress of the

United States of 1864, 13 Statutes at Large, p. 365; that the said lands hereinabove described were granted to the said Northern Pacific Railroad Company by a certain Joint Resolution of the Congress of the United States of America of May 31, 1870, 16 U. S. Statutes at Large, p. 378; that the said Joint Resolution of the Congress of the United States of America provided in part as follows:

“Provided, that all lands hereby granted to said company which shall not be sold or disposed of or remain subject to the mortgage by this act authorized, at the expiration of five years after the completion of the entire road, shall be subject to settlement and pre-emption like other lands, at a price to be paid to said company not exceeding two dollars and fifty cents per acre * * *”

V.

That the respondent herein, the Northern Pacific Railway Company, acquired said lands subject to all of the duties, obligations and limitations contained in the said Joint Resolution of the Congress of the United States of America of May 31, 1870, and subject particularly to the provisions of the proviso contained in said Joint Resolution hereinabove set forth; that the said lands hereinabove described have never been sold or disposed of by the said respondent or by its predecessor, the said Northern Pacific Railroad Company, and are not now subject to the mortgage authorized by the said

Joint Resolution of the Congress of the United States of America of May 31, 1870.

VI.

That the road mentioned and referred to in said proviso of said Joint Resolution is the line of railroad originally commenced by the said predecessor of the respondent and now owned and operated by the respondent; that said line of railroad was fully completed many years ago; that the period of five years after the completion of said railroad has long since expired.

VII.

That the relator herein is over the age of twenty-one years, is a citizen of the United States of America and is a citizen and resident of the State of Montana; that the relator herein is possessed of all the qualifications required of settlers by the land laws and homestead laws of the United States of America, 43 U.S.C.A., Chapter 7, and is a veteran of two years, four months active service with the U. S. Air Force of the United States of America during World War II, and as such is entitled to all of the rights, privileges and benefits afforded to such veterans by the land laws and homestead laws of the United States of America.

VIII.

That heretofore and on the 7th day of November, 1955, affiant, acting for and on behalf of and at the direction of the relator herein, presented to the Northern Pacific Railway Company at said Com-

pany's General Office in the City of St. Paul, Minnesota, an application in writing signed, verified and acknowledged in due form by the relator herein to purchase for purposes of settlement the lands and premises hereinabove described under and pursuant to the terms and provisions of the said Joint Resolution of the Congress of the United States of America of May 31, 1870, 16 U. S. Statutes at Large, p. 378, a true and correct copy of which said application, marked Exhibit "A," is attached hereto and by this reference made a part hereof.

IX.

That affiant acting for and on behalf of and at the direction of the relator herein tendered with said application the sum of \$400.00 in lawful money of the United States, being \$2.50 per acre for the hereinabove-described lands as provided by said Joint Resolution of the Congress of the United States of America of May 31, 1870, hereinabove quoted.

X.

That the relator herein is now ready, willing and able and will, upon conveyance by the respondent herein as required by said provision of said Joint Resolution of the Congress of the United States to the relator herein of the lands and premises hereinbefore described, pay to the said respondent Northern Pacific Railway Company the said sum of \$2.50 per acre for said lands and premises.

XI.

That it would be idle and useless for the relator herein to tender said sum of \$2.50 per acre for said lands and premises hereinabove described into court for the reason that such tender would not be accepted by the respondent Northern Pacific Railway Company and would be an idle and useless act on the part of the relator herein.

XII.

That under the terms and provisions of the said Joint Resolution it was and is the duty of the said Northern Pacific Railway Company, respondent herein, to recognize said application and to comply with the demand therein made and convey all of the title to the hereinbefore-described lands and premises granted by the United States to said respondent or its predecessor by good and sufficient conveyance executed by its duly authorized officers or agents to the relator herein.

XIII.

That notwithstanding said duty the said Northern Pacific Railway Company, respondent herein, refused and still refuses to comply with said provision of the Joint Resolution of the Congress of the United States of America of May 31, 1870, and refused and still refuses to grant the said application of the relator herein and convey all the title to the hereinabove-described lands and premises granted by the United States to said respondent or its predecessor by a good and sufficient conveyance exe-

cuted by its duly authorized officers or agents to the relator herein.

XIV.

That by reason of the failure and refusal of the respondent herein as aforesaid relator has been forced to bring this proceeding to obtain a Writ of Mandamus; that the relator for the purpose of this proceeding has been forced to engage the services of an attorney-at-law; that relator herein has engaged the services of affiant to bring this proceeding; that affiant is an attorney-at-law duly licensed and qualified to practice law in the State of Montana; that the sum of \$500.00 is a reasonable attorney fee for the bringing and prosecution of this proceeding.

XV.

That relator herein has no speedy or adequate or any remedy at law.

Wherefore, relator prays that an alternative writ of mandamus may issue out of the above-entitled court directed to the respondent herein returnable at a day certain to be fixed by the Court herein and commanding that the said respondent recognize and grant the application of the relator herein, a true and correct copy of which said application, marked Exhibit "A" is attached hereto, and convey to the relator herein by good and sufficient conveyance executed by its duly authorized officers or agents all of the title to the hereinbefore-described lands and premises acquired by said respondent herein or by its predecessors by virtue of the said Joint Reso-

lution of the Congress of the United States of America of May 31, 1870, upon payment to the said company by the relator herein of the said sum of \$2.50 per acre for said lands and premises all as provided in and required by said Joint Resolution of the Congress of the United States of America of May 31, 1870, or show cause before this Court why said respondent has not done so.

That relator recover of the respondent herein his costs herein incurred and expended and damages, including attorney fees in the sum of \$500.00, and for such other and further relief as to the Court may seem meet and equitable in the premises.

RALPH J. ANDERSON,
Affiant and Attorney for
Relator.

Subscribed and sworn to before me this 17th day of Nov., 1955.

[Seal] STANLEY P. SORENSON,
Notary Public for the State of Montana, Residing
at Helena, Montana.

My commission expires Sept. 30, 1956.

RALPH J. ANDERSON,
Attorney for Relator.

Duly verified.

EXHIBIT "A"

Application to Purchase Granted Lands

To the Northern Pacific Railway Company of St. Paul, Minnesota, and to its Officers, Directors and Agents, and each of them and all of them:

The undersigned, Keith C. Morton, of Conrad, Pondera, County, Montana, hereby applies to purchase for purposes of settlement those certain lands and premises located in McCone County, Montana, and more particularly described as follows, to wit:

The Northwest Quarter of Section Thirty-five, Township Twenty-two North, Range Forty-eight East, M.P.M., McCone County, Montana;

which lands were granted to your predecessor, The Northern Pacific Railroad Company, by that certain Joint Resolution of the Congress of the United States of America of May 31, 1870, 16 U. S. Stat. at Large, p. 378, which Joint Resolution provides as follows:

"Provided, that all lands hereby granted to said company which shall not be sold or disposed of or remain subject to the mortgage by this act authorized, at the expiration of five years after the completion of the entire road, shall be subject to settlement and pre-emption like other lands, at a price to be paid to said company not exceeding two dollars and fifty cents per acre * * *"

You are informed that this application is made and presented to you under, by virtue of and pursuant to the above-quoted provision of the said Joint Resolution of Congress of May 31, 1870, by which you acquired the hereinabove-described lands and premises.

You are further informed that the undersigned, Keith C. Morton, is over the age of 21 years; is a citizen of the United States of America, and is possessed of all the qualifications required of settlers by the Land Laws and Homestead Laws of the United States of America, 43 U.S.C.A., Ch. 7, and is a veteran of two years, four months active service with the U. S. Air Force of the United States of America during World War II, and as such is entitled to all of the rights, privileges and benefits afforded to such veterans by the Land Laws and Homestead Laws of the United States of America.

The undersigned, Keith C. Morton, tenders herewith, by draft upon the First National Bank of St. Paul, Minnesota, made payable to the Northern Pacific Company, the sum of Four Hundred Dollars (\$400.00), being two dollars and fifty cents per acre for the hereinabove-described lands as provided by the hereinabove-quoted provision of the Joint Resolution of Congress of May 31, 1870, and the undersigned, Keith C. Morton, demands that you execute, by your proper officers and agents, and deliver a good and sufficient deed to the undersigned, Keith C. Morton, conveying the hereinabove lands and premises and your entire interest therein in fee

simple absolute without restriction, or reservation whatsoever to yourselves.

Dated this 3rd day of Nov., 1955.

KEITH C. MORTON,
Applicant.

Duly verified.

EXHIBIT B

In the District Court of the First Judicial District
of the State of Montana, in and for the County
of Lewis and Clark

STATE OF MONTANA, Ex Rel., KEITH C.
MORTON,

Relator.

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Respondent.

ORDER GRANTING ALTERNATIVE WRIT OF MANDAMUS

On reading and filing the Affidavit and duly verified Application of Keith C. Morton and good cause appearing,

It Is Hereby Ordered that an Alternative Writ of Mandamus issue out of and under the seal of this

Court directed to the Northern Pacific Railway Company, a corporation, respondent, commanding it that it convey to the relator herein, by good and sufficient conveyance executed by its duly authorized officers or agents all of the title granted by that certain Joint Resolution of the Congress of the United States of May 31, 1870, which said Joint Resolution is more fully referred to in said application on file herein, to the following-described lands:

The Northwest Quarter of Section Thirty-five, Township Twenty-two North, Range Forty-eight East, M.P.M. McCone County, Montana;

upon the payment to said company by the relator herein of the sum of \$2.50 an acre for the said described land, or that in default thereof it show cause before this Court in the courtroom at the Court-house in the City of Helena, County of Lewis and Clark, State of Montana, on the day of, 1955, at o'clock .. m. of said day why it has not done so.

It Is Further Ordered that a copy of said Affidavit and Application be served on said Northern Pacific Railway Company together with a copy of this Order and with said Writ.

Dated this day of November, 1955.

.....

District Judge.

EXHIBIT C

In the District Court of the First Judicial District
of the State of Montana, in and for the County
of Lewis and Clark

STATE OF MONTANA, Ex Rel., KEITH C.
MORTON,

Relator,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Respondent.

ALTERNATIVE WRIT OF MANDAMUS

The State of Montana to the Northern Pacific Rail-
way Company, a Corporation, Greeting:

Whereas, it manifestly appears by the Affidavit
and Application of Keith C. Morton, the party
beneficially interested herein, that you have refused
to recognize and to grant the Application of said
Keith C. Morton to purchase certain lands and
premises located in McCone County, Montana, and
more particularly described as follows:

The Northwest Quarter of Section Thirty-five,
Township Twenty-two North, Range Forty-
eight East, M.P.M. McCone County, Montana,
which lands were acquired by you subject to the
terms and provisions of that certain Joint Resolu-
tion of Congress of May 31, 1870, and which appli-

eration was presented to you pursuant to the terms and provisions of said Joint Resolution of Congress of May 31, 1870, 16 Statutes at Large, p. 378, and that there is not a plain, speedy and adequate remedy in the ordinary course of law, and

Whereas, by an order of this Court duly given and made in the above-entitled action on the 18th day of November, 1955, it was ordered that a Writ of Mandamus should issue to you, therefore,

We Do Command You that immediately after the receipt of this Writ you do recognize, accept and grant the said Application of Keith C. Morton to purchase those certain lands located in McCone County, Montana, more particularly described as follows:

The Northwest Quarter of Section Thirty-five,
Township Twenty-two North, Range Forty-eight East, M.P.M. McCone County, Montana,

pursuant to the terms and provisions of said Joint Resolution of Congress of May 31, 1870, by which said lands were granted and upon the payment to you by the said Keith C. Morton of the sum of \$2.50 per acre for the said lands you execute by your proper officers or agents and deliver to the said Keith C. Morton a good and sufficient conveyance executed by your duly authorized officers or agents conveying to the said Keith C. Morton all of the title to said lands hereinabove described granted by said Joint Resolution of Congress of May 31, 1870. all pursuant to that certain provision of said Joint

Resolution of Congress which is more particularly set forth in relator's Affidavit and Application on file herein, a copy of which is served upon you together with this Writ, or that you show cause before this Court at the courtroom thereof in the City of Helena, County of Lewis and Clark, State of Montana, on the 12th day of December, 1955, at the hour of 10:00 o'clock a.m. of said day why you have not done so.

Witness the Honorable George W. Padbury, Jr., Judge of the above-entitled Court.

Attested by my hand and the seal of said Court this 18th day of November, 1955.

[Seal]

DAVID R. KEMP,
Clerk;

JUNE J. PRUTTIS,
Deputy Clerk.

[Endorsed]: Filed December 8, 1955.

[Title of District Court and Cause.]

MOTION TO QUASH

Comes now the respondent, and moves for an order quashing the "Affidavit and Application for Writ of Mandamus," the "Order Granting Alternative Writ of Mandamus," and the "Alternative Writ of Mandamus," on the following grounds and for the following reasons:

I.

That the Congressional Acts and resolutions alleged in the application papers and the Congressional legislative history of said acts do not specially enjoin upon the respondent any duty resulting from any office, trust or station to perform the act sought to be commanded, and it appears upon the face of said papers that there is a speedy and adequate remedy in the ordinary course of law and equity for the enforcement of any rights which relator may have or claim under said acts and resolutions.

This motion is made and based upon the laws of the United States of America, upon the Congressional legislative history of the land grants to the Northern Pacific Railroad Company, predecessor in interest of respondent, upon the decisions of the Supreme Court of the United States and Department of the Interior of the United States, and upon all the pleadings, records, and files herein.

COLEMAN, JAMESON &
LAMEY,

By /s/ CALE CROWLEY,
Attorneys for Respondent.

[Endorsed]: Filed December 9, 1955.

[Title of District Court and Cause.]

STIPULATION

Whereas, there are now pending before the Court Docket Numbers 1794, 1795, 1796 and 1797, involving exactly the same basic legal issues; and

Whereas, the respondent has filed separate motions to quash in each of said four docket numbers; and

Whereas, the same attorneys are representing each of the four relators, and the same attorneys are representing the respondent in each of the four cases;

Now, Therefore, it is hereby stipulated and agreed between the parties hereto, acting through their respective counsel of record, that the parties waive oral argument on the motions to quash in each of the four cases, subject to the wishes of the Court in that regard, and further agree that the separate motions to quash may be all submitted for decision to the Court on written briefs, and that the respondent shall file one original brief in support of the four separate motions to quash on or before November 1, 1956, and that the four relators may answer in one separate brief on or before December 1, 1956, and that the respondent may then reply in one brief on or before December 18, 1956, all subject to the approval of the Court.

Dated this 14th day of September, 1956.

COLEMAN, JAMESON &
LAMEY,

By /s/ CALE CROWLEY,
Attorneys for Respondent.

/s/ RALPH J. ANDERSON,
Attorney for Relator.

[Endorsed]: Filed September 14, 1956.

In the District Court of the United States, in and
for the District of Montana, Billings Division

Civil No. 1794

STATE EX REL. MORTON,

Civil No. 1795

STATE EX REL. KUNTZ,

Civil No. 1796

STATE EX REL. PICOTTE,

Civil No. 1797

STATE EX REL. MAHAN,

Applicants,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
Respondent.

MEMORANDUM AND ORDER

It is agreed that the above-entitled causes are all
alike and counsel have elected to file briefs herein

that apply to each and all of them alike. The said actions were commenced in the First Judicial District of the State of Montana, in and for the County of Lewis and Clark, and in each an alternative writ of mandate was secured requiring the respondent to convey to the applicant in each action the quarter section of land involved therein upon payment by each applicant to the respondent the sum of \$2.50 per acre, or to show cause on a date certain why the said writ had not been complied with.

Thereafter all of said actions were removed to the above-entitled court by the respondent, and motions filed herein to quash each and all of said actions, and also seeking an order quashing the affidavit and application for writ of mandamus, the order granting alternative writ of mandamus and the alternative writ of mandamus in each action.

The motions are identical in all of said actions and the grounds alleged are (1) that the Congressional Acts and Resolutions involved do not specially enjoin upon the respondent any duty resulting from any office, trust or station to perform the acts sought to be commanded, and (2) that it appears upon the face of said papers that there is a speedy remedy in the ordinary course of law and equity for the enforcement of the rights which relator may have or claim under the Acts and Resolutions.

Applicants assert that apparently the second ground appearing in the motions is not relied upon

by counsel for respondent as no argument appears in the briefs in support thereof, and for that reason counsel for applicants have given no consideration to the second ground set forth in respondent's motions.

Applicants assume that the issue here, from the standpoint of respondent, is as stated on page 3 of respondent's brief, and is whether or not what is designated as the settlement and pre-emption proviso of the Joint Resolution of Congress of May 31, 1870 (Res. 67, 16 Stat. 278), applies to the lands here involved which are lands acquired by the respondent in what is known as the second indemnity strip provided for by the Joint Resolution above referred to, wherein the proviso reads as follows:

“Provided, that all lands hereby granted to said company which shall not be sold or disposed of or remain subject to the mortgage by this act authorized, at the expiration of five years after the completion of the entire road, shall be subject to settlement and pre-emption like other lands, at a price to be paid to said company not exceeding two dollars and fifty cents per acre;”

In respect to the meaning of this proviso the position of the respondent is to the effect that the lands here in question in these four actions are not to be considered as lands “hereby granted.”

It seems to be understood and authoritatively determined that lands described as granted lands are

those within the place limits, as distinguished from those lands which are within the indemnity limits, as was held in *Priest vs. N. P. R. Co.*, May 23, 1884, 2 L.Dec. 506:

“Lands within indemnity limits are not granted lands. The company as to those lands does not claim to acquire title until actual selection.”

It was stated by Secretary Lamar in *Northern Pacific v. McRae*, 6 L.Dec. 400:

“Now, the grant provided for in its act of incorporation is every alternate section of public land not mineral (except coal and iron) designated by odd numbers to the amount of twenty alternate sections per mile on each side of said railroad line, through the Territories of the United States, and ten sections per mile on each side of said railroad whenever it passes through any State.

“I am clearly of the opinion that by the joint resolution of May 31, 1870, Congress intended that the grant of twenty sections per mile on each side of the road to aid in the construction of said road should be extended to the whole line of the road including that part of the main line via the valley of the Columbia river through Portland to Puget Sound. This conclusion based alone upon the language of the joint resolution would be confirmed, if confirmation was necessary, by the debates in Con-

gress upon said resolution while it was pending and make clear the manifest purpose of said resolution.”

The debates quoted by the Secretary seem to confirm fully his opinion above noted.

In *Hewitt v. Schultz*, 180 U. S. 139, it was held, and likewise in the many cases cited, that “all speak of the granted lands as those within the place limits.”

In *U. S. v. Northern Pacific Railway Company*, 311 U. S. 317, known as the Land Grant Case of 1940, the court seems to have decided questions of special significance here, and among other things said:

“May 31, 1870, Congress again authorized the company to issue bonds to aid in the construction and equipment of its road, to be secured by mortgage on all of its property, railroad, land grant, and franchise to be a corporation. It further authorized the location and construction of the main railroad via the valley of the Columbia River to Puget Sound and of a branch from the main line across the Cascade Mountains to Puget Sound, and made a grant of land in connection with the construction authorized between Portland and Puget Sound, on the same terms as the original grant. It also provided a second indemnity belt extending ten miles beyond the first on either side of the right of way. * * *.”

“The Resolution of May 31, 1870, granted, as respects the additional line authorized between Portland and Puget Sound, place and indemnity lands, as granted for the original line by the Act of 1864. It also authorized what are spoken of as ‘second indemnity’ belts ten miles wide, on either side of the original indemnity limits, in any state or territory in which the company could not obtain the number of sections intended for it by its charter * * *.”

Counsel for the respective parties to the actions seem to be in accord in regard to the quoted part of the decision of the Supreme Court in *Southern Pacific v. Bell*, 183 U. S. 679, found on page 13 of applicants’ brief, and page 8 of respondent’s reply brief, which is in the following language:

“Undoubtedly the company acquires title to both classes of lands by the 3d section of the granting act; but it acquires a title to lands within the place limits by a present grant; but to land within the indemnity limits, only by a future power of selection. In both cases the statute is the origin of the title; but in the one case it gives instantaneously; in the other it is a mere promise to give in the future, and requires the action of the railroad to perfect it. The words ‘hereby granted’ evidently refer to the former.”

The resolution aforesaid, which the court has considered, and which has been considered and passed

upon by other courts, provides that all lands hereby granted to said company shall be subject to settlement and pre-emption like other lands. It seems quite evident that Congress limited the application of the proviso in the Joint Resolution to "all lands hereby granted," and the meaning of that phrase seems to have been very clearly defined in the two cases of *Southern Pacific v. Bell*, 183 U. S. 679, and *Hewitt v. Schultz*, 180 U. S. 139, and that Congress intended in the language employed only the sections of land wherein title vested in the company in *præ-senti*.

After going over the many authorities cited and relied upon counsel for respondent makes the following pertinent inquiry: "How can the applicants seriously urge that by the foregoing language Congress was making a grant of land in the second indemnity strip in Montana?"

Contention of respondent is that the company acquired title to the indemnity lands between Portland and Puget Sound only by a future power of selection. As to lands east of the Portland-Puget Sound line, the company acquired no title under the Joint Resolution. The resolution specified that lands in the second indemnity strip could be selected only in the same State in which there might be a deficiency in the original grant for that State. In Montana, it required first a grant for the place limits by the Act of 1864, and second, a deficiency in those place limits granted in Montana by the Act of 1864.

That the origin of the title for all lands in Montana was in sections 3 and 6 of the Act of 1864.

It was a bone of contention in the land grant case of 1940, 311 U. S. 317, that Montana was included in the settlement and pre-emption proviso but the court held that it applied only to the new grant of lands between Portland and Puget Sound, and the decree of Judge Schwellenbach in 41 F. Supp. 273 seems applicable here, and our own Court of Appeals in the Ninth Circuit, No. 14983, has given support to that view in *Russell v. Northern Pacific Railway Company, et al.*, wherein a rehearing has recently been denied. (January 21, 1957.)

After due consideration of the able arguments of counsel for the respective parties it seems to have been clearly established that the Joint Resolution granted no lands in Montana; that it made a new grant between Portland and Puget Sound; that the term "hereby granted" in the settlement and pre-emption proviso applied only to the place lands in the new grant, and that the issue here has already been decided. A further citation of cases and discussion of questions raised in the voluminous briefs would seem unnecessary since it now appears convincingly that the issue presented here has already been definitely decided between the parties, leaving no issue to the applicants for further litigation, consequently, being duly advised, and good cause appearing therefor, in the opinion of the court, the said motions to quash in the pending cases should be

granted, and such is the order of the court herein.
Exceptions allowed counsel.

/s/ CHARLES N. PRAY,
Judge.

[Endorsed]: Filed February 1, 1957.

In the District Court of the United States, in and
for the District of Montana, Billings Division

No. 1794

STATE OF MONTANA EX REL. KEITH C.
MORTON,

Relator,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Respondent.

JUDGMENT

Whereas, the respondent filed herein its motion to quash the affidavit and application for writ of mandamus, to quash the order granting the alternate writ of mandamus, and the alternate writ of mandamus; and

Whereas, the parties hereto, acting through their respective counsel of record, stipulated in writing to submit the above-captioned case to the court on

written briefs for a decision on said motion to quash; and

Whereas, the respective counsel did submit voluminous written briefs to the court, and the court having been fully advised in the premises and having fully considered the motion and the briefs and all matters connected therewith, and having determined that the motion to quash should be granted, and having filed herein an order granting said motion;

Now, Therefore, It Is Hereby Ordered that the above-captioned action be, and it is hereby, dismissed.

Dated this 5th day of February, 1957.

/s/ CHARLES N. PRAY,
United States District Judge.

[Endorsed]: Filed and entered February 5, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Keith C. Morton, the relator above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Judgment entered in the above-entitled action by the above-entitled Court on the 5th day of February, 1957, and from the whole thereof.

Dated this 4th day of March, 1957.

/s/ RALPH J. ANDERSON,

/s/ STANLEY P. SORENSON,
Attorneys for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 6, 1957.

[Title of District Court and Cause.]

BOND ON APPEAL

Know All Men by These Presents that we, Keith C. Morton, as principal, and the United States Fidelity & Guaranty Co. as surety, are held and firmly bound unto the respondent, the Northern Pacific Railway Company, a corporation, in the above-entitled cause in the sum of Two Hundred Fifty Dollars (\$250.00) for the payment of which we bind ourselves, our heirs, executors, administrators, successors and assigns firmly by these presents.

Sealed with our seals and dated this 4th day of March, 1957.

The condition of the above obligation is such that whereas the relator in the above-entitled cause has appealed, or is about to appeal from that certain Judgment entered in the above-entitled cause on the 5th day of February, 1957, to the United States Court of Appeals for the Ninth Circuit and it is necessary for him to execute and file a good and sufficient bond to said defendants for the sum of Two Hundred Fifty Dollars (\$250.00) to secure the

payment of costs if said appeal is dismissed or the Judgment affirmed or for such costs that the Appellate Court may award if the Judgment is modified.

Now, Therefore, if the above-named Keith C. Morton and the United States Fidelity & Guaranty Co. shall well and truly pay all costs incurred if the appeal is dismissed or the Judgment affirmed and pay all such costs which the Appellate Court shall award if the Judgment is modified, then this obligation to be void, otherwise to remain in full force and virtue.

KEITH C. MORTON,

By /s/ RALPH J. ANDERSON,
One of His Attorneys,
Principal.

[Seal] UNITED STATES FIDELITY
& GUARANTY CO.,

By /s/ JENNIE JUDD,
Its Attorney in Fact.

Countersigned:

HENRY & BURNS AGENCY,
By /s/ DON BURNS.

[Endorsed]: Filed March 6, 1957.

[Title of District Court and Cause.]

STATEMENT OF POINTS

The points upon which appellant intends to rely upon on this appeal are as follows:

1. The Court erred as a matter of law in its memorandum and order Filed February 1, 1957, granting the motion to quash filed by respondent.

2. The Court erred as a matter of law in making and entering its judgment made and entered on February 5, 1957, dismissing the above-entitled action.

3. The Court erred in deciding that the lands involved in this action were not subject to the settlement and pre-emption proviso of the Joint Resolution of Congress of May 31, 1870 (Resolution 67, 16 Stat. 378) reading as follows, to wit:

“Provided, that all lands hereby granted to said company which shall not be sold or disposed of or remain subject to the mortgage by this act authorized, at the expiration of five years after the completion of the entire road, shall be subject to settlement and pre-emption like other lands, at a price to be paid to said company not exceeding two dollars and fifty cents per acre; * * *”

and based upon said decision sustaining respondent's motion to Quash and dismissing the above-entitled action.

/s/ RALPH J. ANDERSON,

/s/ STANLEY P. SORENSON,

Attorneys for Appellant.

Of Counsel:

J. R. VAUGHAN.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 6, 1957.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Montana—ss.

I, E. Warren Toole, Clerk of the United States District Court for the District of Montana, do hereby certify that the annexed papers, to wit:

Judgment Roll, consisting of:

Petition for Removal,
Affidavit and Application for Writ of Mandamus,
Exhibit "A" Application to Purchase Granted Lands,
Order Granting Alternative Writ of Mandamus,
Alternative Writ of Mandamus,
Motion to Quash,
Memorandum and Order of the Court filed Feb. 1, 1957,
Judgment,

and the following annexed papers; to wit:

Notice of Removal,
Stipulation,
Notice of Appeal,
Bond on Appeal,
Statement of Points,
Designation of Contents of Record on Appeal,
are the originals filed in Civil Action Numbered 1794, State of Montana, ex rel., Keith C. Morton

versus Northern Pacific Railway Company, a corporation, Relator and Respondent, respectively, and designated by the Appellant-Relator, as the record on appeal in said cause.

Witness my hand and the seal of said Court at Great Falls, Montana, this 6th day of April, A.D. 1957.

[Seal] E. WARREN TOOLE,
Clerk as Aforesaid;

By /s/ C. G. KEGEL,
Deputy Clerk.

[Endorsed]: Nos. 15516, 15517, 15518 and 15519. United States Court of Appeals for the Ninth Circuit. Keith C. Morton, Appellant, vs. Northern Pacific Railway Company, a Corporation, Appellee. Robert E. Kuntz, Appellant, vs. Northern Pacific Railway Company, a Corporation, Appellee. Gene A. Picotte, Appellant, vs. Northern Pacific Railway Company, a Corporation, Appellee. John S. Mahan, Appellant, vs. Northern Pacific Railway Company, a Corporation, Appellee. Transcript of Record. Appeals from the United States District Court for the District of Montana.

Filed: April 9, 1957.

Docketed: April 15, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals for the
Ninth Circuit

Civil Nos. 15516, 15517, 15518 and 15519

STATE EX REL. MORTON, STATE EX REL.
KUNTZ, STATE EX REL. PICOTTE and
STATE EX REL. MAHAN,

Applicants,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,

Respondent.

STIPULATION

Whereas, judgment was rendered in the above-entitled actions in the District Court of the United States in and for the District of Montana, Billings Division, on the 5th day of February, 1957, and

Whereas, the plaintiff in each of said cases within time has perfected an appeal to this court by serving and filing a notice of appeal and a cost bond on appeal to this court, together with a request that the record in each of said cases be certified to the above-entitled court and has paid the statutory fee for filing said notice of appeal at the time said notice was filed, and

Whereas, the issues in each of said cases are identical and that the pleadings which were filed herein are identical except as to the name of the party plaintiff and the description of the lands described

in each complaint. The defendant is the same in each action above named, and

Whereas, these cases were submitted to the trial court for decision on a motion to quash an alternative writ of mandate upon joint briefs there being only one brief presented to the trial court and an identical judgment was entered in each cause except as to the name of the parties.

Now, Therefore, in consideration of the premises, it is mutually agreed and stipulated by and between counsel for respective parties that only one record in one of the above-entitled causes need be printed and that only one brief on behalf of the respective parties need be filed and that the decision of this Honorable Court in the case in which the record and briefs are printed and filed may be controlling and decisive of the issues in each of the other three cases.

Dated this 15th day of March, 1957.

COLEMAN, JAMESON &
LAMEY,

By /s/ CALE CROWLEY,

Attorneys for Defendant and
Appellee.

/s/ RALPH J. ANDERSON,

/s/ STANLEY P. SORENSON,

Attorneys for Plaintiffs and
Appellants.

[Endorsed]: Filed April 23, 1957.

[Title of Court of Appeals and Cause.]

ORDER

Whereas, counsel for the respective parties in the above-entitled actions have filed in this Court a stipulation that only one record in one of the above-entitled causes need be printed and that briefs in only one of the above-entitled causes on behalf of the respective parties need be filed and that the decision of this Court in the case in which the record and briefs are printed and filed may be controlling and decisive of the issues in each of the other three cases, and

Whereas, it appears from said stipulation of the parties that the issues in each of said cases are identical and that the pleadings filed in each of said cases are identical except as to the name of the party plaintiff and the description of the lands described in each complaint and that the defendant is the same in each action above named, and

Whereas, it appears from said stipulation that the above-entitled causes were submitted to the trial court for decision on a motion to quash an alternative writ of mandate upon joint briefs there being only one brief presented to the trial court and an identical judgment was entered for each cause except as to the name of the parties, and

Whereas, the Court deems the making of such an order appropriate in the above-entitled causes, now therefore

It Is Ordered and This Does Order that the record as designated by the parties be printed in only one of the above causes to be selected by the Clerk of this Court; that briefs be filed on behalf of the respective parties in said cause selected to be printed as hereinbefore set forth and that the decision of this Court in the case in which the record and briefs are printed and filed shall be controlling and decisive of the issues in each of the other three cases.

Done and dated this 19th day of April, 1957.

/s/ WILLIAM DENMAN,
Chief Judge.

/s/ WALTER L. POPE,

/s/ FREDERICK G. HAMLEY,
Judges, U. S. Court of Appeals for the Ninth
Circuit.

[Endorsed]: Filed April 23, 1957.

The first of these was the discovery of gold in California in 1848. This discovery led to a great influx of people to California, and the state became a great center of population. The second was the discovery of gold in Nevada in 1859. This discovery led to a great influx of people to Nevada, and the state became a great center of population. The third was the discovery of gold in Colorado in 1858. This discovery led to a great influx of people to Colorado, and the state became a great center of population.

The fourth was the discovery of gold in Idaho in 1860. This discovery led to a great influx of people to Idaho, and the state became a great center of population. The fifth was the discovery of gold in Montana in 1862. This discovery led to a great influx of people to Montana, and the state became a great center of population.

The sixth was the discovery of gold in Wyoming in 1869. This discovery led to a great influx of people to Wyoming, and the state became a great center of population. The seventh was the discovery of gold in Utah in 1871. This discovery led to a great influx of people to Utah, and the state became a great center of population.

The eighth was the discovery of gold in Arizona in 1876. This discovery led to a great influx of people to Arizona, and the state became a great center of population. The ninth was the discovery of gold in New Mexico in 1878. This discovery led to a great influx of people to New Mexico, and the state became a great center of population.

The tenth was the discovery of gold in Texas in 1880. This discovery led to a great influx of people to Texas, and the state became a great center of population. The eleventh was the discovery of gold in Oklahoma in 1889. This discovery led to a great influx of people to Oklahoma, and the state became a great center of population.

The twelfth was the discovery of gold in Kansas in 1890. This discovery led to a great influx of people to Kansas, and the state became a great center of population. The thirteenth was the discovery of gold in Nebraska in 1891. This discovery led to a great influx of people to Nebraska, and the state became a great center of population.

The fourteenth was the discovery of gold in Iowa in 1892. This discovery led to a great influx of people to Iowa, and the state became a great center of population. The fifteenth was the discovery of gold in Missouri in 1893. This discovery led to a great influx of people to Missouri, and the state became a great center of population.

Nos. 15516-15519

United States Court of Appeals

For the Ninth Circuit

LEITH C. MORTON,

Appellant,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a corporation,
Appellee.

ROBERT E. KUNTZ,

Appellant,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a corporation,
Appellee.

GENE A. PICOTTE,

Appellant,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a corporation,
Appellee.

JOHN W. MAHAN,

Appellant,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a corporation,
Appellee.

Brief of Appellant

Counsel:

J.R. VAUGHAN

1112 Equitable Life Assurance Bldg.

11 West Fifth St., Los Angeles 13, California.

ROSLAND J. ANDERSON

STANLEY P. SORENSON

117 Power Block, Helena, Montana

Attorneys for Appellant.

FILED

JUN 21 1957

PAUL P. O'BRIEN, CLERK

Nos. 15516-15519

United States Court of Appeals

For the Ninth Circuit

EITH C. MORTON, Appellant,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a corporation,
Appellee.

ROBERT E. KUNTZ, Appellant,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a corporation,
Appellee.

BENE A. PICOTTE, Appellant,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a corporation,
Appellee.

JOHN W. MAHAN, Appellant,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a corporation,
Appellee.

Brief of Appellant

Counsel:

R. VAUGHAN

1112 Equitable Life Assurance Bldg.
411 West Fifth St., Los Angeles 13, California.

ALPH J. ANDERSON

STANLEY P. SORENSON

517 Power Block, Helena, Montana
Attorneys for Appellant.

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PRELIMINARY MATTERS

Pursuant to stipulation of counsel in the respective cases and to an order of this Court (R. 22, 38) this brief is submitted for consideration in four actions appealed to this Court, being causes Nos. 15,516-15, 519; Keith C. Morton, appellant, vs. Northern Pacific Railway Company, a corporation, appellee; Robert E. Kuntz, appellant vs. Northern Pacific Railway Company, a corporation, appellee; Gene A. Eotte, appellant, vs. Northern Pacific Railway Company, a corporation, appellee, and John W. Mahan, appellant, vs. Northern Pacific Railway Company, a corporation, appellee.

All references will be to the first of these causes, the record of which was printed for consideration in connection with all four causes and the arguments herein presented shall be equally applicable to all four cases, they being identical except as to parties appellant and as to the land involved, each action involving a different quarter section of Section 35, Township 22 North, Range 48 East, M.P.M., McCone County, Montana, and each action having been bought by a different party, each of whom, however, are residents and citizens of the State of Montana, against the same party defendant.

1. Jurisdiction of the Lower Court and of This Court

Four actions were originally brought in the District Court of the First Judicial District of the State of Montana, and for the County of Lewis and Clark and in each of said actions an alternative writ of mandamus was secured

(R. 18) requiring the respondent to convey to the relator or applicant the quarter section of land described upon payment by the relator to the respondent company of the sum of \$2.50 per acre or to show cause why it had not done so at a day and date certain.

Appellee Northern Pacific Railway Company removed each of said actions to the District Court of the United States, in and for the District of Montana, alleging that the relator claimed to be entitled to the relief prayed for under proper interpretation of the terms and provisions of the Act of Congress of the United States of 1864, 13 Stat. at Large, p. 365, and under the terms and provisions of a joint resolution of Congress of the United States of May 31, 1870, 16 Stat. at Large, p. 378, and under the terms and provisions of the land laws and homestead laws of the United States of America, 43 U.S.C.A. Chap. 7, alleging that in consequence the matter in controversy arises under the laws of the United States, alleging further that relator is a citizen and resident of the State of Montana and that the respondent is a corporation organized and existing under and by virtue of the laws of the State of Wisconsin and that the action presents a controversy between citizens of different states and alleging that the real property involved exceeds the sum or value of \$3,000.00, exclusive of interest and costs. Under the provisions of Sections 1331, 1332 and 1441, Title 28 U.S.C.A., the Railway Company requested the District Court of the United States in and for the District of Montana to accept jurisdiction over the controversy (R. 4-6). The petition for removal was not resisted by

Appellant and appellant concedes that the cause is a proper one for removal under the provisions of the United States Code enacted by the respondent and appellee.

Appellee Northern Pacific Railway Company filed a motion to quash the affidavit and application for writ of mandamus, the order granting alternative writ of mandamus and the alternative writ of mandamus (R. 20) which motion was granted (R. 30-31) and judgment entered dismissing the cause (R. 31-32).

This Court's jurisdiction to hear and determine the appeal is based upon Section 1291, 28 U.S.C.A., providing that the courts of appeal shall have jurisdiction of appeals from all final decisions of the District Courts of the United States.

Notice of appeal was filed within time (R. 32). The requisite bond on appeal has been filed (R.33) and the appeal has since been prosecuted with diligence.

2. Statement of the Case

The action was commenced by the filing in the state court of an affidavit and application for writ of mandamus in which affidavit and application it is stated that the Northern Pacific Railway Company is and was for sometime prior to the filing of the application the owner of the land involved in the action, that the land was granted to the predecessor of the respondent company, the Northern Pacific Railroad Company, a corporation created by and pursuant to an Act of Congress of the United States of 1864, 13 Statutes at

Large, p. 365, by a joint resolution of the Congress of the United States of America of May 31, 1870, 16 U. S. Statutes at Large, page 378, which joint resolution provided in part as follows:

"Provided, that all lands hereby granted to said company which shall not be sold or disposed of shall remain subject to the mortgage by this act authorized, at the expiration of five years after the completion of the entire road, shall be subject to settlement and pre-emption like other lands, at a price to be paid to said company not exceeding two dollars and fifty cents per acre * * *."

That the respondent acquired the lands subject to all the duties, obligations and limitations contained in said joint resolution and that the said lands had never been sold or disposed of by the respondent or by its predecessor the Northern Pacific Railroad Company and are not now subject to the mortgage authorized by the said joint resolution; that the road mentioned and referred to in the proviso of the joint resolution is the line of railroad originally commenced by the predecessor of the respondent and now owned and operated by the respondent; that the said line of railroad was fully completed many years ago.

The affidavit and application alleges the citizenship of a majority of the applicant and relator, his right to the benefits afforded veterans of World War II under the land laws of the United States and the presentation on his behalf by the Northern Pacific Railway Company at its general office of an application to purchase the lands in controversy pre-

sant to the provisions of the Joint Resolution of May 31, 1870, which application was accompanied by a tender of \$.50 per acre. The affidavit and application then alleges refusal on the part of the respondent to recognize and grant such application to purchase. Relator seeks an alternative writ of mandamus commanding respondent to recognize and grant the application upon the payment of the sum of \$.50 per acre or show cause why it has not done so and seeks reasonable attorney's fees (R. 6-13). An alternative writ of mandamus was secured in the state court (R. 18).

By the motion to quash and dismiss (R. 20) respondent and appellee admits the truth of the factual allegations contained in the affidavit and application for the writ. State ex rel. Blenkner v. Stillwater County, 66 Pac. (2d) 78, 104 Mont. 387; State ex rel. Halloran v. McGrath, 67 Pac. (2d) 838, 104 Mont. 490, and it has been conceded throughout the proceedings below by the respondent and appellee that the lands involved are located in the second indemnity belt provided for in that portion of the Joint Resolution of 1870 which reads as follows:

"and in the event of there not being in any State or Territory in which said main line or branch may be located, at the time of the final location thereof, the amount of lands per mile granted by Congress to said company, within the limits prescribed by its charter, then said company shall be entitled, under the directions of the Secretary of the Interior, to receive so many sections of land belonging to the United States, and designated by odd numbers, in such State or Territory, within ten miles on each side of said road, be-

yond the limits prescribed in said charter, as will make up such deficiency, on said main line or branch, except mineral and other lands as excepted in the charter of said company of eighteen hundred and sixty-four to the amount of the lands that have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of subsequent to the passage of the act of July two, eighteen hundred and sixty-four."

For the convenience of the Court we have included an appendix pertinent provisions of both the Act of 1863 Statutes at Large, p. 365, the original granting act, and the Joint Resolution of May 31, 1870, 16 Statutes at Large p. 378.

The issue involved is exclusively a question of law and is as follows:

Does the settlement and preemption proviso of the Joint Resolution of Congress of May 31, 1870, apply to the lands here involved which are lands acquired by the respondent in the second indemnity strip provided for by the said Joint Resolution?

The lower court held that this issue had already been decided and that the proviso does not apply to lands within the second indemnity belt (R. 30).

SPECIFICATIONS OF ERROR

1. The Court erred as a matter of law in its memorandum and order filed February 1, 1957, granting the motion to quash filed by respondent.

2. The Court erred as a matter of law in making and entering its judgment made and entered on February 5, 1957, dismissing the above-entitled action.

3. The Court erred in deciding that the lands involved in this action were not subject to the settlement and pre-emption proviso of the Joint Resolution of Congress of May 31, 1870 (Resolution 67, 16 Stat. 378) reading as follows, to-wit:

"Provided, that all lands hereby granted to said company which shall not be sold or disposed of or remain subject to the mortgage by this act authorized, at the expiration of five years after the completion of the entire road, shall be subject to settlement and pre-emption like other lands, at a price to be paid to said company not exceeding two dollars and fifty cents per acres; * * *"

and based upon said decision sustaining respondent's motion to quash and dismissing the above entitled action.

ARGUMENT

At the outset it is necessary that this case be differentiated from Cause No. 14,983 in this Court, *Russell v. Northern Pacific Railway Company et al.*, rehearing denied January 21, 1957. That case involved the applicability of the proviso to lands which were located within the original public land grant of the Act of 1864 and was an action by the successor in interest of a purchaser of those lands from the Railway Company to have declared void the mineral reservation contained in the original deed from the Rail-

way Company to said purchaser. This cause involves lands which were not within the granting act of 1864 but which are located in the second indemnity belt provided for by the Joint Resolution of 1870, and involves an attempt by a prospective purchaser to take advantage of the benefit attempted to be afforded to such parties by the proviso of the Joint Resolution.

The Proviso Is Applicable to the Lands Acquired by the Appellee in the Second Indemnity Belt Pursuant to the Provisions of the Joint Resolution of 1870.

At the outset we acknowledge that diligent and exhaustive research has uncovered no case which deals directly with the problem here involved. The lower court in construing the proviso of the joint resolution has held that the words "hereby granted" in the proviso refer exclusively to the place lands granted by the Joint Resolution of 1870 and that the lands acquired by the railroad company within the second indemnity limits also provided by the Joint Resolution of 1870 do not come within the operation of the proviso. In so doing the lower court has relied, as did the appellee, upon decisions construing the words "hereby granted" as they appear in the Act of 1864 with particular reference to Sections 3 and 6 of that Act. The appellee and the court below attempted to apply the authorities defining the words "hereby granted" appearing in Sections 3 and 6 of the Act of 1864 to the words "hereby granted" as used in the proviso of the Joint Resolution of 1870. It is our contention that this phrase cannot thus be divorced from the context of the proviso of the Resolution of 1870 and

be construed by applying to it the meaning required by the purpose of the Act of 1864, particularly Sections 3 and 6, and the reasoning of the authorities defining the meaning of "hereby granted" as used in the Act of 1864. The issue involved is, of course, a problem in statutory construction, that is, what lands were referred to by the words "hereby granted" in the proviso of the Joint Resolution of 1870. In 50 Am. Jur. Statutes, Sec. 303, pp. 283-287 we find the following general rule relative to the construction of statutes:

"The purpose for which a statute is enacted is of primary importance in the interpretation thereof. Indeed, a statute is often regarded as speaking as plainly by means of the purpose which underlies it as in any other manner. In any event, in the interpretation of a statute of doubtful meaning, it is proper to take into consideration its purpose or object, or the aim, design, motive, or end in view, or the aspirations intended to be efficiently embodied in the enactment. The construction of the statute should be made with reference to the purpose of the statute, or in the light thereof, and in harmony and conformity therewith, in order to aid, advance, promote, subserve, support, and effectuate such aim, design, motive, end, aspirations, or object."

In support of that statement the author cites among other cases, *United States v. American Trucking Association*, 310 U.S. 534, 60 Sup. Ct. 1059, 84 L. Ed. 1345, in which case the Supreme Court of the United States said:

"In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language

so as to give effect to the intent of Congress. There is no invariable rule for the discovery of that intention. To take a few words from their context and with them thus isolated to attempt to determine their meaning certainly would not contribute greatly to the discovery of the purpose of the draftsmen of a statute, particularly in a law drawn to meet many needs of a major occupation.

"There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. Where that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even where the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words. When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination'. The interpretation of the meaning of the statutes, as applied to justiciable controversies, is exclusively a judicial function. This duty requires of every body of public servants, the judges, to construe the meaning of what another body, the legislators, has said. Obviously there is danger that the courts' conclusion as to legislative purposes will be unconsciously influenced by the judges' own views or by factors not considered by the enacting body. A lively appreciation of the danger is the best assurance of escape from such

threat but hardly justifies an acceptance of a literal interpretation dogma which withholds from the courts available information for reaching a correct conclusion. Emphasis should be laid, too, upon the necessity for appraisal of the purposes as a whole of Congress in analyzing the meaning of clauses or sections of general acts. A few words of general connotation appearing in the text of statutes should not be given a wide meaning, contrary to a settled policy, 'excepting as a different purpose is plainly shown'."

It is clear that we must examine the reasoning of the decisions relied upon by the lower court in its opinion in the light of the purpose to be achieved by Sections 3 and 6 of the Act of 1864 and if the purpose of the proviso is not the same and if the same reasoning cannot be applied in arriving at the meaning of the words as used in the proviso then it follows that the result arrived at by the lower court is not supported by the authorities upon which it relies.

It is appellant's contention that the proviso of the joint resolution applies equally to all of the lands acquired by the respondent pursuant to the joint resolution. That is, that the proviso applies not only to those lands granted in praesenti by the joint resolution but also to the lands in the indemnity strip set up by the joint resolution. We express no opinion as to whether or not the proviso may be applied to the lands granted in praesenti and the indemnity lands acquired by virtue of the Act of 1864 and included within the Act of 1864, that issue not being involved in this case. The appellant contends further that the proviso of the joint

resolution is mandatory and requires the appellee to comply with the request of the appellant seeking to exercise his right granted to him by the clear and explicit provision of the Joint Resolution of 1870.

With these contentions firmly in mind examination of the authorities contained in the opinion of the lower court reveals that they do not support the court's decision.

The first case referred to by the lower court is *Priest N.P.R. Co.*, May 23, 1884, 2 Land Decisions 506 (R. 26). That case involved an issue as to the rights of a homesteader's entry on lands within the indemnity limits as distinct from the place lands prior to selection by the railroad company. It was there held that the indemnity lands were open to settlement and preemption and the decision is a refusal to withdraw those lands from settlement and preemption.

The problem with which the Department of the Interior was concerned with respect to the indemnity lands prior to selection is more understandably presented in an opinion of the Department of the Interior of May 17, 1884, 2 Land Decisions 511. It was the contention of the railroad company that under Section 6 of the granting act of 1864 the indemnity lands as well as the place lands were withdrawn from settlement and preemption. The reasoning of the Department of the Interior is best illustrated by that portion of the opinion which reads as follows:

"That this is true of the granted lands, 'in place,' now settled law as construed by the judicial tribunals, the latest decision being that of *Van Wyck v. Kneva*

(106 U.S., 360). As to those lands there can be no question of the duty of this Department to give timely notice of the date and extent of this appropriation by prompt withdrawal, not alone for the protection of the company, *but for the protection of the settlers*, who can no longer acquire them.

"Respecting the indemnity belt, it is to be observed that the object of the law is to give within its entire limit just what has been lost in place, by other appropriation within the granted limits to the amount of lands intended to be granted, *and no more*. If by reason of such appropriation after the date of the act and prior to definite location the whole of the first belt shall be exhausted, *in that event* resort may be had to the second belt, under the act of 1870, to supply that particular loss, *and no more*.

Now, with respect to the definite location, the law makes absolute grant, with precision from that date as to particular lands, because those lands are immediately identified as a whole—being the alternate sections on each side of said road. The circumstances or status of each tract—whether 'vacant' or 'appropriated'—can then be ascertained. When ascertained it either falls within the grant as of its date or fails to pass on account of such exception as the law declares.

As to the indemnity law gives at date of definite location, not title but a right to acquire title by selection—based on the deficiency ascertained as above. And the provision of 1870 rests on a possibility that at date of definite location there may be in some State or Territory a want of sufficient lands in the limits fixed in 1864, on account of subsequent disposals, *to make the full original grant*, and allows the de-

ficiency thus caused to be supplied beyond the original limits.

"This might seem like a legislative reservation of the first limit or indemnity belt from the date of definite location. But the acts place the whole subject 'under the direction of the Secretary of the Interior.' The power to direct a proceeding necessarily implies not mere oversight in minor details, but control, supervision, discretion; and in such a matter as the selection and setting apart of public lands for any purpose, of a body of public lands, where the use of the word 'select' implies that there is something left after selection and where other right to acquire the lands already exists, it must, I think, be held that the power resides in this Department to adjudge when, in what manner and to what extent, the statute requires the exercise of such control and direction as to give to the public as well as the particular grantee, all the rights and privileges granted by law." (Emphasis supplied).

It should be noted that there is no support in this opinion for any argument to the effect that the indemnity lands once they were selected and that selection approved were not lands granted by the act. What else could they be? The key to understanding the problem lies in the use of the words "in praesenti" referring to the so-called plat limits. This definitive language appears in the decision cited in the above quoted opinion. *Van Wyck v. Knevel*, 106 U.S. 360, 16 Otto 360, 27 L. Ed. 201-202.

"The grant is one in praesenti, except as its operation is affected by that condition; that is, it imports the transfer, subject to the limitations mentioned, of the present interest in the lands designated. The difficulty

in immediately giving full operation to it, arises from the fact that the sections designated as granted are incapable of identification until the route of the road is 'definitely fixed'. When that route is thus established, the grant takes effect upon the sections by relation as of the date of the Act of Congress."

The reference to the place lands as lands granted in *praesenti* implies a distinction between those lands and the lands in the indemnity belt but that distinction does not exclude and in fact it suggests that the lands within the indemnity belt are nonetheless granted lands after their selection by the company to replace lands lost to the grant *praesenti*.

The lower court relies in its opinion upon the case of *Hewitt v. Schultz*, 21 Sup. Ct. 309, 180 U.S. 139, 45 L. ed. 463 (R. 27). That case was ejectment brought by Hewitt, the homestead patentee, against Schultz, a purchaser from the N.P.R. Co. The land involved was within the first indemnity strip in the territory of North Dakota. Hewitt settled on the lands on April 10, 1882, and the company had filed its selection list embracing the land involved on March 19, 1883. The Department of the Interior held that the lands in the indemnity limits did not fall within the place lands and were not included in the term "thereby granted" as used in Section 6 of the Act of July 2, 1864, and were thus not subject to withdrawal from the operation of the Public Land Laws until a selection had been made by the company. The Supreme Court of the United States upheld this construction. However, this in-

terpretation of the words "hereby granted" *even as used in Section 6 of the Act of 1864* was certainly not free from doubt. The Supreme Court in its opinion said:

"But without considering the matter as if it were for the first time presented, it is sufficient to say that the question before us cannot be said to be free from doubt. The intention of Congress has not been so clearly expressed as to exclude construction or argument in support of the view taken by Secretaries Lamar, Vilas, and Smith, and upon which the Land Department has acted since 1888. 'It is the settled doctrine of this Court', as was said in *United States v. Alabama G.S.R. Co.* 142 U.S. 615, 621, 35 L. Ed. 113, 1136, 12 Sup. Ct. Rep. 308, 'that, in case of ambiguity the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and, if such construction be acted upon for a number of years, will look with disfavor upon any sudden change, where parties who have contracted with the government upon the faith of such construction may be prejudiced. These observations apply to the case now before us and lead to the conclusion that if the practice in the Land Department could with reason be held to have been wrong, it cannot be said to have been so plain or palpably wrong as to justify the court, after the lapse of so many years, in adjudging that it had misconstrued the act of July 2d, 1864. The order of withdrawal by the Secretary of the Interior, upon which the title of the railroad company depends, being of the way, there is no legal ground to question the title of the plaintiff to the land in dispute."

Certainly this case cannot be accepted as authority for the proposition that the words "hereby granted" as en-

employed in the settlement and preemption proviso of the Joint Resolution of 1870 are subject to the same limitations as are those words as employed in Sections 3 and 6 of the Act of 1864.

In all of the cases which we have considered this proviso of the joint resolution was in no way involved. The decision as to the meaning of the words "hereby granted" was concerned only with those words as they appear in those sections of the act withdrawing lands from settlement and preemption and there is no support therein for any argument that the lands acquired in the indemnity belts were not lands granted by the act when title was acquired by the railroad. True, the indemnity lands were not lands granted in praesenti. The lands granted in praesenti were those lands within the place limits. The distinction is one arising out of the basic intent behind the granting acts. The intent and attempt was to grant to the railroad a definite and certain amount of land. To this end the railroad was granted every odd numbered section within the so-called place limits, which was the measure of the grant. It is self-evident that as to this grant the lands intended to be given could be definitely ascertained immediately upon the filing of a map of definite location of the railroad. Hence the company's title could attach to those lands at once and therefore those lands were lands granted in praesenti. However, it was contemplated and understood that there would be odd numbered sections of land within those place limits to which the rights of others had already attached or which might otherwise have been disposed of prior to the grant.

For that reason and in order to assure to the railroad company the amount of land intended to be granted to the company put no more, the indemnity limits were provided and from these limits the railroad company was to select land to replace those lost in the so-called place limits by reason of prior disposal.

These lands within the indemnity belt were, however, incapable of identification until such time as a deficiency became apparent in the place lands and the company made a selection to replace that deficiency. For this reason the right to indemnity land was spoken of as a "float." See the language of the Department of the Interior employed in *Atlantic Pac. Railroad Co. v. Sant Fe Pac. Railroad Co.*, and *Greene Cattle Co., Inc.*, decided Jan. 8, 1944, 58 Land Decisions 577.

"The right of the grantee in indemnity lands prior to selection has also been described as 'only a void which attaches to no specific lands until the selection is actually made (Ryan v. Railroad Company, 99 U.S. 382, 386; Cedar Rapids, etc., Railroad v. Herring, 111 U.S., 39), or as a right to no land capable of identification by any principles of law or rules of measurement. Kansas Pacific Railroad Company v. Atchison Topeka & Santa Fe Railroad Company, 112 U.S. 411, 421.'" (Emphasis supplied).

From the foregoing the problem confronting the Department of the Interior and the courts in construing the withdrawal provided for in Section 6 of the Act of 1864 can easily be understood. Withdrawal of the lands in the place limits would not withdraw from settlement and preemption

ty lands which must be eventually acquired by the railroad company if it met its obligations. However, withdrawal of the lands within the indemnity limits would immediately result in the withdrawal of great areas of lands which would never be required by the company to complete its grant. Hence the conclusion that "hereby granted" employed in these sections of the Act of 1864 applied only to the lands granted in praesenti but it does not follow that the lands within the indemnity limits are not granted within the operation of the proviso of the Joint Resolution of 1870 when they are acquired by the Railroad company.

With respect to the construction of this act as employed in the preemption proviso the problem is entirely different. It is to be noted that the preemption proviso does not go into effect until five years after the completion of the entire road. The precise sections of the place lands granted by the Act of 1864 and by the resolution are determinable immediately upon the filing of the map of the route of the railroad and upon completion of twenty-five consecutive miles of road the company became entitled to patents contiguous to such twenty-five miles of road. At this time the sections of place lands lost to the grant would become apparent and the railroad would immediately be entitled to select from the indemnity lands replacement sections. Hence it is clear that five years after the completion of the entire road the grant would be determined and the company's title to both the place and indemnity lands fixed. Consequently, it is obvious that the problem with respect

to the construction of Sections 3 and 6 of the Act of 186 does not apply in connection with the construction of the proviso in the joint resolution requiring the lands granted to the company to be opened to settlement and preemption at the expiration of five years after the completion of the entire road.

It should be clear that these indemnity lands when acquired by the railroad are lands granted by the act or the resolution depending upon the indemnity limits within which they are contained. The railroad company was to receive a specified amount of land measured by the primary provision of the grant relative to the place lands. The only purpose apparent for the indemnity provision was to replace lands which were for some reason not available within the place limits. When those lands were acquired they obviously become as much a part of the grant as were the lands within the place limits. In the case of *United States v. N.P. Railway Co.*, 256 U.S. 51, 41 Sup. Ct. 439, 65 Ed. 825, 828, we find the following language of the Supreme Court of the United States demonstrating this proposition:

"The provision relating to indemnity lands was *as much a part of the grant* and contract as the one relating to land in place (*Payne v. Central P.R. Co.*, 25 U.S. 288, ante, 598, 41 Sup. Ct. Rep. 314), and it is apparent from the granting act and resolution that 'it was the purpose of Congress in making the grant to confer a substantial right to land within the indemnity limits in lieu of lands lost within the place limits'. *Weyerhaeuser v. Hoyt*, 219 U.S. 380, 387, 5

L. Ed. 258, 261, 31 Sup. Ct. Rep. 300." (Emphasis supplied)

This proposition is also supported by the case of Southern Pacific Railroad Co. v. Bell, 22 Sup. Ct. 232, 183 U. S. 679, 46 L. Ed. 386, and by the very quotation from that case which is set forth in the opinion of the court below (R. 28).

"If the command of the statute were to withdraw from the market, instead of survey, all odd-numbered sections within the 40-miles strip, the position of the railroad company in this case would be impregnable; but as the withdrawal only extends to the lands 'hereby granted, we must look elsewhere to ascertain the meaning of those precise words. There is good reason for withdrawing lands within the place limits, since these lands already belong to the railroad company, as soon as they are identified by the location of the line, while lands within the indemnity limits may never be required at all, and in most cases are required only to a limited extent. *Undoubtedly the company acquires title to both classes of lands by the 3d section of the granting act*; but it acquires a title to lands within the place limits by a present grant; but to land within the indemnity limits, only by a future power of selection. *In both cases the statute is the origin of the title*; but in the one case it gives instantaneously; in the other it is a mere promise to give in the future, and requires the action of the railroad to perfect it. The words 'hereby granted' evidently refer to the former." (Emphasis supplied).

Of course, the only act of the railroad necessary to perfect the grant as to indemnity lands is a selection thereof.

Again, the distinctive definition "in praesenti" applied to the place land is the key. By referring to the land as land granted in praesenti the obvious intention is to distinguish it from the land within the indemnity limits, however, it cannot be disputed that the railroad company acquired those lands within the indemnity limits by grant and neither can it be disputed that the grant as to the second indemnity belt must be found within the Resolution of 1870. This is self evident because without the Resolution of 1870 the company could never have become entitled to any land within the area embraced by the second indemnity belt.

We have given no consideration to the case of *N.P. v. McRae*, 6 Land Decisions 400, quoted from by the court below (R. 26) for the reason that that decision has nothing whatever to do with the problem involved. As stated by Secretary Lamar, in the opinion from which the court quotes, the sole issue there involved was as follows:

"The sole issue presented in this case is whether the Northern Pacific Railroad Company has a grant of lands for the line of its road from Portland to Puget Sound."

That case had nothing whatever to do with the provisions of the joint resolution with which this case is concerned.

During the interval between the Act of July 2, 1864 and the Joint Resolution of 1870, the prodigality of the immense grants to the railroads and the interest of the public therein became a matter of the utmost concern. So

Great Northern R. Co. v. U.S., 315 U.S. 262, 62 S. Ct. 529, 86 L. Ed. 836. The development of the policy in favor of the public evidenced by such proviso as the one here under consideration coupled with the circumstances that the Northern Pacific had failed to perform the conditions of the Act of 1864 renders it well nigh inconceivable that Congress would adopt a proviso requiring disposition to settlers of merely that fraction of the lands to be acquired under the Joint Resolution of 1870 which were the place lands adjacent to the newly authorized line over the Cascades. Such an idea would result in a situation which we feel would be indefensible. Indemnity lands were available for settlement and preemption until selection by the company. After selection by the company and approval of that selection title to the indemnity lands vested in the company and the company became the owner thereof precisely as was true as to the place lands. What then is the result under the lower court's ruling? The result simply stated would be that the place lands granted by the Resolution of 1870, title to which passed to the railroad company immediately, would be open to settlement and preemption five years after the completion of the road whereas the indemnity lands selected by the company to replace lands which were not available in the place limit would not be open to settlement and preemption after their selection by the railroad company. This result is absurd on its face. The railroad company would acquire a better right under the secondary portion of the grant than it acquired under the primary portion thereof. It seems obvious to us that

the intent of the congress was that all lands acquired by virtue of the joint resolution should be open to settlement and preemption five years after the completion of the entire railroad.

The language of the Joint Resolution of 1870 confirms the conclusion that the proviso is applicable to all of the land acquired under the terms of the resolution. First, the joint resolution authorized the mortgaging of all Northern Pacific's property of all kinds and descriptions, thereby empowering the mortgaging of its entire unearned land grant including indemnity and place lands granted by the Resolution of 1870 and making it plain that the resolution is applicable to all lands encompassed by the resolution. Next the resolution reaffirms the authorization to construct the road "under the provisions and with the privileges, grants and duties provided for in its act in incorporation," from the original point specified in the original act and unspecified in the joint resolution by a changed main line route to Portland with authority for a branch line to Puget Sound through the Cascade mountains. Thus again in its re-affirmation of authority to construct the road the reference is to the entire line. Next, in the event "in any state or territory" the amount of land granted is not available an additional "lieu land" belt is provided. The reference to "state or territory" makes it plain again that the Joint Resolution of 1870 is embracing the line from beginning to end. Lastly within the single section comes the two-fold proviso, the first referring to disposition and the second referring to foreclosure sales and each of these is based

upon the words "lands hereby granted." The proviso governs all that has gone before. The words "lands hereby granted" cannot be applied to a small fraction thereof as to final disposition to settlers without being equally applicable to but a small fraction as to foreclosure sales. Yet, has never been contended that the proviso as to foreclosure sales is applicable only to this small fraction of the grant, no doubt for the reason that the mortgage authorized by the Joint Resolution of 1870 is clearly applicable to the entire grant. Just as the proviso as to foreclosure applies to the lands granted along the entire line so also its counterpart as to final disposition of granted lands applies at the very least to all lands acquired under the joint resolution.

The applicability of the proviso to the lands here involved is confirmed by later congressional expression. Thus the joint congressional committee acting under the Resolution of June 4, 1924, (43 Statutes at Large, 461) among its other castigations of the railroad collusion, fraud and hunting of the legislative and public will states as one of the reasons for the forfeiture of the Northern Pacific's then outstanding indemnity claims:

"(d) The failure of the Northern Pacific Railroad Company to dispose of any of the granted lands through settlement and preemption after July 4, 1884, as required by the Resolution of May 31, 1870, * * *"
(Report of the committee is found in the Congressional Record of March 2, 1929, 70th Congress, 2nd Session, Vol. 70, part 5, pages 4118 to 5122).

Acting upon the committee report the Congress by its

act of June 25, 1929, expressed its continuing purpose and intention that the policy of the joint resolution of 1870 relative to disposition of granted lands should prevail. Section 3 of that Act (46 U.S. Statutes at Large, p. 41; 48 U.S.C.A., Sec. 921) provides in part as follows:

" . . . and the passage of this Act shall not be construed as in anywise evidencing the purpose or intention of Congress to depart from the policy of the United States expressed in the resolution of May 3, 1870, relative to the disposition of granted lands by said grantee, and the right is hereby reserved to the United States to, at any time, enact further legislation relating thereto."

The Land Grant Case of 1940

The lower court in its opinion cites and relies upon *U.S. v. Northern Pacific Ry. Co.*, 61 Sup. Ct. 264, 311 U.S. 319, 85 L. Ed. 210 (R. 30). The only portion of that opinion which could conceivably be considered as applicable is the portion thereof reading as follows:

"We hold, contrary to the Government's assertion that the proviso of the Resolution of 1870, requiring the lands be opened by the company to settlement and preemption applies only to the additional lands granted by that Resolution and not to lands *acquired* under the grant of 1864. We hold further that the company was not a trustee of the lands for the United States either in its own right or in behalf of possible settlers. It results that the Government cannot call upon the company to account as a trustee for the proceeds of sale of the lands." (Emphasis supplied).

As we have previously pointed out the lands here involved are not lands "*acquired under the grant of 1864*" consequently the statement from the land grant case of 1940 has no applicability to the present case. Furthermore, while we do not argue in this case that the proviso can be applied to lands which were included within the Grant of 1864 still by way of demonstration that the land grant case certainly cannot be considered as authority in this case we submit that there is good reason in that opinion for holding that the proviso does apply to lands included within the grant of 1864 but which were not earned at the time of the joint resolution. The case was brought as a result of the Act of June 25, 1929, previously cited, directing the forfeiture of certain land grants to the Northern Pacific and instructing the Attorney General to file an action to quiet title, for accounting and damages against the Northern Pacific wherein the congress expressed its continuing intent as to disposition by the Northern Pacific in accordance with the policy of the Joint Resolution of 1870. By the Act of May 22, 1936, (49 Statutes at Large, 1369, Chapter 444) there was authorized a direct appeal to the Supreme Court of the United States of the action against Northern Pacific instituted by the Attorney General in accordance with the Act of June 25, 1929. The proviso of the Joint Resolution of May 31, 1870, was a major issue. The government contended in its appeal, No. 33, before the Supreme Court of the United States that the proviso was binding upon Northern Pacific as to every part of the lands granted to it, that the Northern Pacific had breached

the policy of the United States prescribed in the proviso thereby wholly defeating its right to any further award (311 U.S. 317, at page 338). The Northern Pacific move to dismiss this charge, was sustained by the Special Master and the District Court ordered the dismissal. On appeal the Supreme Court of the United States reserved its ruling saying:

"The justices who heard this case are equally divided in opinion upon these issues. No opinion is expressed upon them, and they are reserved, in view of the fact that our rulings on other issues may be dispositive of the entire controversy." (311 U.S. 342).

and the judgment was reversed for further proceedings

"The appeal in No. 4 is without merit, but, upon the appeal in No. 3, the judgment is reversed and the cause is remanded for further proceedings as indicated in this opinion." (311 U.S. 376).

In its paragraph 18 of the opinion the Supreme Court of the United States passed upon the government's claim for damages by reason of the Northern Pacific's breach of the proviso. That court specifically held, contrary to the ruling of the District Court, that the government was entitled to prove any damage to it or advantage to the Northern Pacific arising out of the breach of the proviso. As to additional lands granted by the joint resolution but not as to lands "*acquired*" under the grant of 1864 (311 U.S. 268). Here we might remark that this holding is a judicial determination that the appellee here is bound by the proviso as successor to the federally chartered corporation, the foreclosure sale and proceedings notwithstanding.

United States v. Northern Pacific R. Co., *supra*, 311 U.S. 1365, unquestionably determined that the proviso established a legally enforceable obligation. It unequivocally decided that the obligation applied to all additional lands received by the company under the Joint Resolution of 1870. The court reserved the question as to whether the proviso applied to every part of the granted lands on the issue of forfeiture of right to further awards of lands. At the same time the court held that no damages would lie as to "lands acquired" under the Act of 1864, but that damages would lie as to the lands received pursuant to Joint Resolution of 1870. These rulings would be inherently contradictory unless the word "acquired" is given its logical meaning, namely those lands actually earned by adjacent construction accepted by the government under the terms of the Act of 1846 but prior to and without using the benefit of the Resolution of 1870.

The court also reserved the question of whether the breach of the conditions of the Act of 1864 by Northern Pacific defeated its entitlement thereunder (311 U.S. 1365, paragraph 1). The court in *United States v. Northern Pacific R. Co.* did not attempt to delineate the lands which were "acquired" by Northern Pacific under the Act of 1864. This was a factual matter, the decision on which was dependent upon the taking of testimony and the cause was remanded for that purpose.

The case was finally compromised and an adjudication contemplated by Congress was not had and Judge

Schwellenbach so stated. See *U.S. v. Northern Pacific Ry. Co.*, 41 Fed. Supp. 273 at 280. The district judge's misgivings as to the decree based upon settlement without congressional authority are obvious from his expression. The consequence of this decree by compromise is the absence of ruling on the facts and contentions which the Supreme Court of the United States reserved.

By the foregoing it has not been our intention to attempt to secure in this court a review of this court's decision in *Russell v. Northern Pacific Railway Co.*, et al Cause No. 14983. We have been concerned only with the proposition that the decision of the Supreme Court of the United States in the land grant case of 1940, *U.S. v. Northern Pacific Ry. Co.*, supra, 311 U.S. 317, is not authority for the lower courts holding that the proviso does not apply to the lands here involved.

THE PROVISO ENJOINS UPON THE APPELLEE A POSITIVE DUTY TO PERFORM THE ACTS SOUGHT TO BE COMMANDED

That the proviso of the Joint Resolution is a peremptory command of law to the Company is demonstrated by the following authorities.

In *U.S. v. N. P. Ry. Co.*, 61 Sup. Ct. 264, 311 U.S. 317, 84 L. Ed. 210, the land grant case of 1940, the court said:

"A majority of the Justices who heard this case are of the opinion that the proviso of the Resolution of 1870 *required* the company to open the lands granted by the Resolution to preemption and settlement at the

expiration of five years from the completion of the entire line in 1887, whether the lands were then subject to the mortgage or not; that its failure so to do was a breach of its contract with the United States and that the Government is entitled, if it can, to prove any damage to it or advantage to the company, which resulted from this breach of contract." (Emphasis supplied).

The preemptory nature of the proviso may also be demonstrated by comparison with the grant considered in the case of *Oregon & California Ry. Co. v. U.S.*, 238 U.S. 393, 10 Sup. Ct. 908, 59 L. Ed. 1360. The proviso in the granting act there involved read as follows:

"That the lands granted by the act aforesaid shall be sold to actual settlers only, in quantities not greater than one quarter section to one purchaser, and for a price not exceeding Two Dollars and Fifty Cents per acre;"

In that case the United States Supreme Court held that the above-quoted proviso was not a mandate to sell but a limitation of the power to sell. The court said:

"There could not be an absolute right to settle or purchase unless there was an absolute compulsion to sell." '

The Supreme Court was clearly correct as to the proviso involved in the case last above cited. The words "shall be sold to actual settlers only" are words of limitation, not of compulsion. The proviso in this case, on the other hand, required that the lands be subject to settlement and preemption at a price to be paid to the company. How can

it be said that the lands are open to settlement and preemption if the company could refuse to sell to a person seeking to purchase under the proviso? Clearly the proviso in the Resolution of 1870 was a mandate to sell provided of course, that there should be a purchaser. This requirement is recognized by the Supreme Court of the United States in the quotation set forth above from *United States v. N. P. Ry. Co.*, supra, 61 Sup. Ct. 264. That this was and is a continuing requirement is demonstrated by the quotation previously set forth at the beginning of this brief from *Oregon & California Ry. Co. v. U.S.*, supra, 238 U.S. 393, which we repeat at this point.

"We may observe that the Acts of Congress are laws as well as grants, and have the constancy of laws as well as their command and are operative and obligatory until repealed."

See also the Act of Congress of 1929 providing for the bringing of the action, referred to by respondent as the Land Grant Case of 1940, wherein the Congress of the United States said:

"* * * and the passage of this Chapter shall not be construed as in anywise evidencing the purpose or intention of Congress to depart from the policy of the United States expressed in the resolution of May 3, 1870, relative to the disposition of granted lands to said grantee, and the right is hereby reserved to the United States to, at any time, enact further legislation relating thereto." 43 U.S.C.A. 923.

This proviso of the Joint Resolution of 1870 was made with the clear intent and purpose to prevent an enormous

ant to the Railway Company from resulting in a tremendous land monopoly, recognizing that such would not to the best interest of the country. A country benefits as its people are benefitted and clearly the prospective purchasers from the company should have received and could receive the benefit of the proviso.

It is understandable that the Company should seek to perpetuate the tremendous advantage received by virtue of the land grants but the Congress, in making the additional part of the Resolution of 1870, sought to limit that advantage to a legitimate and reasonable benefit to the Company in aid of its construction.

CONCLUSION

Based upon the foregoing it is respectfully submitted that the court below erred in sustaining appellee's motions to quash and in rendering judgment dismissing the cause. It is further submitted that if the purpose of the Congress is not to be flouted and ignored further this cause must be reversed and remanded with directions to overrule the motion to quash.

Respectfully submitted,

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CHAP. CCXVII—An Act Granting Lands to Aid in the Construction of a Railroad and Telegraph Line from Lake Superior to Puget's Sound, on the Pacific Coast by the Northern Route.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled * * *

"SEC. 3. And be it further enacted, That there be, and hereby is, granted to the 'Northern Pacific Railroad Company', its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line on the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof, the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from preemption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land-office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or preempted, or otherwise disposed of, other lands shall be selected by said

company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections; * * *

"SEC. 4. And be it further enacted, That whenever said Northern Pacific Railroad Company' shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the President of the United States shall appoint three commissioners to examine the same, and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial, and workmanlike manner, as in all other respects required by this act, the commissioners shall so report to the President of the United States, and patents of lands, as aforesaid, shall be issued to said company, confirming to said company the right and title to said lands, situated opposite to, and coterminous with, said completed section of said road; and, from time to time, whenever twenty-five additional consecutive miles shall have been constructed, completed, and in readiness as aforesaid, and verified by said commissioners to the President of the United States, then patents shall be issued to said company conveying the additional sections of land as aforesaid, and so on as fast as every twenty-five miles of said road is completed as aforesaid: Provided, That not more than ten sections of land per mile, as said road shall be completed, shall be conveyed to said company for all that part of said railroad lying east of the western boundary of the State of Minnesota, until the whole of said railroad

shall be finished and in good running order, as a first-class railroad, from the place of beginning on Lake Superior to the western boundary of Minnesota: Provided, also, That the lands shall not be granted under the provisions of this act on account of any railroad, or part thereof, constructed prior to the date of the passage of this act. * * *

"SEC. 6. And be it further enacted, That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as far as may be required by the construction of said railroad, and the odd sections of land hereby granted shall not be liable to sale, or entry, or preemption before or after they are surveyed, except by said company, as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting preemption rights, and the acts amendatory thereof, and of the act entitled 'An Act to secure homesteads to actual settlers on the public domain,' approved May twenty, eighteen hundred and sixty-two, shall be, and the same are hereby, extended to all other lands on the line of said road, when surveyed, excepting those hereby granted to said company, and the reserved alternate sections shall not be sold by the government at a price less than two dollars and fifty cents per acre, when offered for sale.

"* * *

"SEC. 8. And be it further enacted, That each and every grant, right, and privilege herein are so made and given

and accepted by, said Northern Pacific Railroad Company, upon and subject to the following conditions, namely: That the said company shall commence the work on said road within two years from the approval of this act by the President, and shall complete not less than fifty miles per year after the second year, and shall construct, equip, furnish, and complete the whole road by the fourth day of July, anno Domini eighteen hundred and seventy-six.

"SEC. 9. And be it further enacted, That the United States make the several conditioned grants herein, and that the said Northern Pacific Railroad Company accept the same, upon the further condition that if the said company make any breach of the conditions hereof, and allow the same to continue for upwards of one year, then, in such case, at an time thereafter, the United States, by its Congress, may do any and all acts and things which may be prudent and necessary to insure a speedy completion of the said road.

"SEC. 10. And be it further enacted, That all people of the United States shall have the right to subscribe to the stock of the Northern Pacific Railroad Company until the whole capital named in this act of incorporation is taken up, by complying with the terms of subscription; and no mortgage or construction bonds shall ever be issued by said company on said road, or mortgage, or lien made in any way, except by the consent of the Congress of the United States.

"SEC. 20. And be it further enacted, That the better to accomplish the object of this act, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the government at all times (but particularly in time of war) the use and benefits of the same for postal, military, and other purposes, congress may, at any time, having due regard for the rights of said Northern Pacific Railroad Company, add to, alter, amend, or repeal this Act."

"(No. 67). A Resolution authorizing the Northern Pacific Railroad Company to issue its Bonds for the Construction of its Road and to secure the same by Mortgage, and for other Purposes.

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the Northern Pacific Railroad Company be, and hereby is, authorized to issue its bonds to aid in the construction and equipment of its road, and to secure the same by mortgage on its property and rights of property of all kinds and descriptions, real, personal, and mixed, including its franchise as a corporation; and, as proof and notice of its legal execution and effectual delivery, said mortgage shall be filed and recorded in the office of the Secretary of the Interior; and also to locate and construct, under the provisions and with the privileges, grants, and duties provided for in its act of incorporation, its main road to some point on Puget Sound, via the valley of the Columbia river, with the right

locate and construct its branch from some convenient point on its main trunk line across the Cascade Mountains to Puget Sound; and in the event of there not being in any State or Territory in which said main line or branch may be located, at the time of the final location thereof, the amount of lands per mile granted by Congress to said Company, within the limits prescribed by its charter, then said Company shall be entitled, under the directions of the Secretary of the Interior, to receive so many sections of land belonging to the United States, and designated by odd numbers, in such State or Territory, within ten miles on each side of said road, beyond the limits prescribed in said charter; as will make up such deficiency, on said main line or branch, except mineral and other lands as excepted in the charter of said company of eighteen hundred and sixty-four, the amount of the lands that have been granted, sold, reserved, occupied by homestead settlers, preempted, or otherwise disposed of subsequent to the passage of the act of July two, eighteen hundred and sixty-four. And that twenty-five miles of said main line between its western terminus and the city of Portland, in the State of Oregon, shall be completed by the first day of January, anno Domini eighteen hundred and seventy-two, and forty miles of the remaining portion thereof each year thereafter, until the whole shall be completed between said points: Provided, that all lands hereby granted to said company which shall not be sold or disposed of or remain subject to the mortgage by this act authorized, at the expiration of five years after the completion of the entire road, shall be subject to

settlement and preemption like other lands, at a price to be paid to said company not exceeding two dollars and fifty cents per acre; and if the mortgage or other legal proceeding, or the mortgaged lands hereby granted, or any part of them, be sold by the trustees to whom such mortgage may be executed, either at its maturity or for any failure or default of said company under the terms thereof, such lands shall be sold at public sale, at places within the States and Territories in which they shall be situate, after not less than sixty days' previous notice, in single sections or subdivisions thereof, to the highest and best bidder; Provided further, That in the construction of said railroad, American iron or steel only shall be used, the same to be manufactured from American ores exclusively.

"SEC. 2. And be it further resolved, That Congress may at any time alter or amend this joint resolution, having due regard to the rights of said company, and any other parties."

STATE OF MONTANA

COUNTY OF LEWIS AND CLARK

} ss.

_____being first duly
sworn upon oath deposes and says: that he is the Printer
who printed the foregoing brief; that he deposited in the
United States postoffice at Helena, Montana, on the 19th
day of June, 1957, 3 true, complete and correct copies of the
foregoing brief, enclosed in an envelope securely sealed with
the proper amount of postage affixed thereto, addressed to
W. L. Leman, Lamey & Crowley, that there is regular daily com-
munication by mail between Helena, Montana, where affiant
has his office and place of business and Billings, Montana,
where said attorneys reside and have their place of business.

Subscribed and sworn to before me this _____
day of _____, 1957.

Notary Public for the State of Montana,
Residing at Helena, Montana.

My commission expires _____

_____.

United States Court of Appeals

For the Ninth Circuit

KEITH C. MORTON,	Appellant,
vs.	
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ROBERT E. KUNTZ,	Appellant,
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Brief of Appellee Railway Company

Appeal from the United States District Court
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PAUL P. O'BRIEN

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Brief of Appellee

STATEMENT OF ISSUE

On July 2, 1864, Congress passed the original Northern Pacific Land Grant Act (*C. 217, 13 Stat. 365*) which authorized construction of a line of railroad between Lake Superior and Puget Sound; made a grant of a specified amount of land in defined "place limits" to subsidize the construction of the road; gave the company

the right to acquire patents to the sections so acquired; gave the company a right of indemnity to fulfill the grant to the extent of the amount originally contemplated, in the event of a deficiency in the amount of land in the "place limits" specified; and authorized a "first indemnity strip" in which the right of indemnity could be consummated so that the full amount originally granted would be given.

On May 31, 1870, by a Joint Resolution (*Res. 67, 16 Stat. 378*), Congress authorized construction of a new line of railroad between Portland and Puget Sound not contemplated by the 1864 act; made a new land grant between Portland and Puget Sound containing similar "place limits," and a similar "first indemnity strip," to subsidize the new construction; and gave the company the right to acquire patents to sections to the extent of the amount of land contemplated by the new grant.

In addition, Congress authorized a "second indemnity strip," along the old line of 1864, and the new line of 1870, but the authorization specified that sections could be acquired in the "second indemnity strip" only in the same state or territory in which there was a deficiency in the amount of lands per mile in the original charter or grant for that same state or territory.

The Joint Resolution also added a settlement and preemption proviso not included in the 1864 act, upon which appellants rely, reading in part as follows:

" * * * provided, that all lands *hereby granted* to said company * * * *shall be subject to settlement*

*and preemption like other lands * * *.*" (Emphasis supplied.)

These four cases involve the ownership of lands in the "second indemnity strip" in the Territory and State of Montana for which the United States gave a patent to appellee.

Assuming for now that their procedure is that contemplated by the language of the proviso "shall be subject to settlement and preemption like other lands," and long after appellee received patents to the lands, appellants separately served upon appellee in writing instruments entitled "Application To Purchase Granted Lands," and demanded that appellee execute deeds conveying such lands to appellants at a consideration of \$2.50 per acre. Appellants seek a writ of mandamus compelling appellee to make such conveyance.

The District Court quashed the writs sought, and judgment was entered in each of the four cases in favor of the appellee and against the appellants dismissing the four separate actions.

We respectfully submit that the judgments should be affirmed for the reason that no lands, either place or indemnity, were granted in Montana to appellee by the later act of 1870, that the only lands which were granted to appellee by the act of 1870 were additional lands between Portland and Puget Sound to subsidize construction of the new line. The source and origin of the title to all lands in Montana was the Act of 1864.

In addition, we respectfully submit that when, in the

later act of 1870, Congress restricted the settlement and preemption proviso to "all lands hereby granted," it intended or contemplated only the new lands granted between Portland and Puget Sound, and did not contemplate any land in Minnesota, North Dakota, Montana, Idaho, or Western Washington, all of which were acquired under and by virtue of the act of 1864.

ARGUMENT

A. *The Act of 1864.*

July 2, 1864, is the effective date of the original Northern Pacific Land Grant Act (*C. 217, 13 Stat. 365*). Section 3 provided that at the time the line of railroad became definitely fixed, and a plat thereof was filed in the general land office, and the United States at that time had full, unencumbered title, then:

"That there be, and *hereby is* granted to the 'Northern Pacific Railroad Company,' its successors and assigns * * * every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States * * *."

By the foregoing, Congress defined for the Territories the "place lands" or "place limits," located in a strip 40 miles wide on either side of the completed line of road. Realizing that the United States might not have full, unencumbered title to these place lands, and that there might be a deficiency, Congress granted a right of indemnity and defined a second strip 10 miles wide, known as the "first indemnity strip," located between 40 and 50

miles from, and on either side of, the completed line of road, out of which the full amount of land granted might be fulfilled. Preceding the designation of the "first indemnity strip," Section 3 provided:

"and whenever, prior to said time (that is, prior to the time the line of road was definitely fixed and plat filed), any of said sections shall have been * * * otherwise disposed of, *other lands* shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior * * *."

Provisions of Section 6 are of particular pertinence here. Section 6 first required a government survey for 40 miles in width on either side of the entire line of road, the width of the "place strip" in territories. It then provided:

"* * * *the odd sections of land hereby granted shall not be liable to sale, or entry, or preemption before or after they are surveyed, except by said company, as provided by this act; but the provisions of the (preemption and settlement laws) shall be, and the same are hereby, extended to all other lands on the line of said road, when surveyed, excepting those hereby granted to said company. * * **" (Emphasis supplied.)

Under the foregoing provisions the lands in the "place limits" were never subject to settlement or preemption except by appellee. Indemnity lands, on the other hand, were at all times subject to settlement and preemption like other lands until selected.

In authorizing this first line of road in 1864 between Lake Superior and Puget Sound, Congress subsidized the construction by granting a specified quantity of lands,

specific numbered sections, within defined "place limits." A defined quantity of land was contemplated. The Railroad Company was required to definitely fix the line of road, and to file its map of the definite location. On the date that map was filed, title to all those sections within the place limits which were then unencumbered, vested in the Railroad Company in praesenti as of July 2, 1864, whether surveyed or not.

Congress realized that title to many of those sections might be otherwise encumbered when the line of road became definitely fixed, and map filed, and that the full amount of land granted might not be available in the "place limits." Congress intended that the full amount granted pass to the Railroad Company. Accordingly, in addition to the "place limits," it granted a right of indemnity for any lands lost from the "place limits," designated a "first indemnity strip, and required a public survey 40 miles wide on either side along the entire line of road. If, after survey, there appeared to be a deficiency in the lands granted in the "place limits" from the amount of land originally contemplated and originally granted, the Railway Company could select replacements in the indemnity strip to make up that deficiency. The Secretary of Interior then had the duty to ascertain whether those sections selected in the indemnity strip were otherwise unencumbered as of the date of selection, and whether they were non-mineral in character. If unencumbered as of the date of selection, and non-mineral in character, it was the duty of the Secretary of Interior

to issue patents to the Railway Company for such lands selected.

Congress also desired to settle the country. It specified that indemnity lands were at all times open to settlement and preemption until settled.

Title to all sections in the "place limits" which were otherwise unencumbered when the map of definite location was filed vested immediately in the Railroad Company as of July 2, 1864. They were "lands hereby granted." They were never thereafter open to settlement or preemption.

As indicated, the right to lands in the indemnity limits likewise vested immediately as of the date the map of definite location was filed by the terms of the granting act. Title could not vest, however, until a later date of selection, and then only if the lands as of the date of selection were otherwise unencumbered and non-mineral in character. Selection for purposes of indemnification could not be made until after the survey directed by the act had been completed. Indemnity lands were open to settlement and preemption at all times until selected. They were never "lands hereby granted."

It is clear that the source of the title to indemnity lands as well as place lands, and the right to acquire such lands, arose out of the original granting act. The right of indemnification was fixed as of the moment of the granting act; the amount of land for which the Railroad Company was to be indemnified was determined as of the date the map of definite location was filed; the right to ac-

quire such lands vested as of that date by the terms of the granting act; but whether or not the right was ever to be consummated depended upon the status of the title at the later date of selection. The source of title, however, and the right to acquire title, to all indemnity lands between Lake Superior and Puget Sound arose out of the act of July 2, 1864.

B. *Legislative History of Joint Resolution of 1870.*

By 1870, there was an increasing sentiment in Congress to specifically limit land grants with some form of a settlement and preemption proviso. Some members of Congress wanted to apply such provisos to all land grants, whether new or old. Others felt it would be unconscionable to apply such a proviso to those grants which had already been given by Congress, but agreed that they should be applied to all new grants.

In considering the Joint Resolution of May 31, 1870, which authorized a new line between Portland and Puget Sound, and made a new grant of additional lands between Portland and Puget Sound, not contemplated by the act of 1864, Congressmen made repeated attempts to draft a settlement and preemption proviso that would apply to the old grant of 1864 between Lake Superior and Puget Sound, as well as to the new grant of 1870 between Portland and Puget Sound. All were defeated.

It is helpful and revealing to trace through the debates in Congress only that portion of the discussion concerning the settlement and preemption proviso upon

which the appellants now rely. There was a clear intent upon the part of Congress to apply such a provision to all new land grants, but not to affect the grant in the act of 1864, already made by Congress.

Action taken by the Senate on the Joint Resolution of 1870 is found on the following pages of the Congressional Globe: Feb. 8, Pp. 1097; Feb. 22; Feb. 28, Pp. 1584-1586; Mar. 2, Pp. 1624-1627; Apr. 7, Pp. 2480-2486, Pp. 2491-2495; Apr. 9, Pp. 2539-2547; Apr. 11, Pp. 2569-2584; Apr. 20, Pp. 2833-2848; Apr. 21, Pp. 2867-2869.

Proceedings before the House are found on the following pages of the Congressional Globe: May 5, Pp. 3263-3271; May 10, Pp. 3343-3348; May 11, Pp. 3365-3368; May 25, Pp. 3786-3798; and May 26, Pp. 3850-3853.

On February 28, the Joint Resolution, without any settlement and preemption proviso whatsoever, was taken up and first discussed (*Pp. 1584-1585*).

On March 2, Senator Wilson of Massachusetts requested to amend the Joint Resolution by adding the following:

"The additional alternate sections of land hereby granted by this act shall be sold by the company only to actual settlers in quantities not exceeding 160 acres or quarter-section to any one settler at prices not exceeding \$2.50 per acre." (*Pp. 1626-1627.*)

April 7, Senator Howell from Iowa moved to amend Wilson's proposed amendment to change the words "sections of land hereby granted by this resolution" to the

words "sections of land heretofore granted and hereby granted by this resolution." (*P. 2480*). After considerable discussion had passed on the floor of the Senate, Senator Howell then stated:

"If the Senator will yield a moment, I understand this grant, so far as the amendment I offered is concerned, has already been made; and therefore I do not know that it becomes me at this stage to interfere to make that amendment, and so I withdraw it. But I will stand by the amendment that was offered by the Senator from Massachusetts." (*P. 2482.*)

On that same date, April 7, Senator Casserly of California renewed the amendment which had been proposed by Howell, and which Howell had withdrawn with the foregoing language. Senator Pomeroy argued with respect to an amendment that would apply the settlement and preemption proviso to the lands "heretofore granted" as well as to the lands "hereby granted":

"If the Senator from California (Mr. Casserly) had read carefully the amendment of the Senator from Massachusetts he would have seen that all that is embraced in the new grant is put at \$2.50 an acre * * *; but I apprehend the Senator from California is too good a lawyer to suppose that he can make that apply to a grant which already exists and that the company have had in their possession rightfully for several years. * * * It is a species of retrograde legislation, going backward. It is in the nature of violating a contract, which is only a little less than an immorality whenever proposed by any legislative body. While (?) Congress has power to do it, of course, I (do not?) doubt; but it certainly has not the right to do it * * *. When that was not in the original act, it is too late to put it in now." (*Pp. 2482-2483; we are uncertain of the accuracy of the language marked?.*)

* * *

"Mr. CASSERLY. I understand that the amendment which I renewed obviated that objection. If I have renewed the wrong amendment that was my mistake.

* * *

"Mr. CASSERLY. My intention was to apply the original amendment to the new grant." (*P. 2483*)

* * *

" * * * I wish to withdraw the amendment which I renewed. * * * If it undertakes to deal with the lands already granted, of course I shall not wish to offer any such amendment. * * *" (*P. 2484*)

On April 9, there was considerable discussion of the amendment proposed by Senator Wilson (*Pp. 2539-2547*), and on April 11 some significant events took place (*Pp. 2569-2584*). Senator Thurman of Ohio requested Wilson to temporarily withdraw his amendment so as to permit Thurman to offer an amendment (*P. 2569*). Thurman's amendment in addition to numerous other restrictions and limitations also provided specifically "that the alternate sections of land heretofore or hereby granted to said company * * * shall be sold by said company to actual settlers upon the same, and to no other person or persons." (*P. 2569*). With respect to that Thurman amendment, Senator Wilson stated:

"Mr. WILSON. I move to strike out in the amendment the words 'heretofore or,' so that the terms of the amendment of the Senator from Ohio will apply only to so much of the land as is granted by this Resolution, and will not interfere with the original

grant. I do not wish to take anything of that grant away." (*P. 2580.*)

Mr. Casserly then asked Senator Wilson what was before the Body. To that Mr. Wilson replied:

"Mr. WILSON. I will simply say that my amendment is to strike out the words 'heretofore or,' so that the provisions of the amendment of the Senator from Ohio shall apply to the grant now made, and not to the original grant.

* * *

"Mr. CONKLING. It makes it prospective, and not retrospective also."

Upon the vote, Wilson's motion to strike from the amendment the words "heretofore or" was passed by the Senate, and such language was stricken. (*Pp. 2581-2582.*)

The Thurman amendment as thus modified was itself rejected. On that same date, April 11, Wilson's initial proposed amendment was then put to a vote and rejected. (*P. 2584.*)

On April 20, Wilson proposed another amendment which was a form of settlement and preemption proviso applicable only to the new lands granted by the resolution. Although it was defeated, the discussions reflected the growing sentiment in Congress that all new grants of lands should be subjected to some form of a settlement and preemption proviso. (*Pp. 2842-2846.*)

April 21 saw final activity in the Senate which by unanimous vote had consented that the Joint Resolution would be voted on at 3:00. Mr. Scott had offered as an amendment the settlement and preemption proviso in the

final form in which it passed, and upon which the appellants now rely, which was then included in the Joint Resolution as it finally passed on that date. (*Pp.* 2868-2869).

It is clear from examining the discussions in the House, that the House understood it was the intention of the Senate to apply the settlement and preemption proviso only to the new lands granted by the Resolution, and not to lands acquired by reason of the original Act of 1864. On May 11 and May 25, Mr. Hawley and Mr. Sargent offered amendments that all lands granted to the Company should be subject to the settlement and preemption proviso (*Pp.* 3367, 3788). Mr. Sargent then said:

"Mr. SARGENT. The joint resolution as it passed the Senate and as now pending, provides that if after five years the lands granted by this bill are not sold they shall be subject to settlement and preemption like other lands, at not exceeding \$2.50 an acre. I wish to extend that provision to all lands granted by any law to this company; * * *." (*P.* 3788)

Other amendments were likewise offered in the House to impose the settlement and preemption proviso on all lands, including those acquired under the Act of 1864, and each and all of such attempts were defeated.

The following decisions have commented upon the foregoing convincing legislative history:

N. P. v. McRae, 6 L. Dec. 400;

U. S. v. N. P., 14 S. Ct. at 603; 152 U.S. 284, 38 L. Ed. 443;

U. S. v. N. P., 61 S. Ct. at 287, 311 U.S. at 368;

Russell v. N. P. et al, 9th C.C., 238 F. (2d) 636,
Cert. Den. June 24, 1957.

We respectfully submit that it is clear from the legislative history what Congress meant when it added a settlement and preemption proviso with the restrictive language "lands hereby granted." It was intended to apply the proviso only to the new and additional lands granted by the resolution between Portland and Puget Sound. It was never intended to apply the proviso to any lands, place or indemnity, in Minnesota, North Dakota, Montana, Idaho, or Western Washington, granted by the Act of 1864.

Such is even more clear when we consider, as we shall later on in this brief, those decisions of the Supreme Court of the United States which have construed the meaning of the language "lands hereby granted," and those decisions which have directly considered the meaning and effect of this settlement and preemption proviso. Appellants, of course, would have the court ignore such decisions, because with the legislative history quoted above, they make such a formidable obstacle for the appellants to overcome.

C. *The Act of 1870.*

On May 31, 1870, the Joint Resolution became effective (*Res. 67, 16 Stat. 378*). It authorized the railroad company to locate and construct a new main line between Portland and Puget Sound:

"under the provisions and with the privileges, grants, and duties provided for in its act of incorporation."

In other words, we must read into the Joint Resolution the sections of the act of 1864, including the two of particular importance here, Sections 3 and 6. The Joint Resolution accordingly provided the same "place limits" and "first indemnity" strip, with respect to the new main line between Portland and Puget Sound:

Section 3:

"That there be, and *hereby is* granted to the 'Northern Pacific Railroad Company,' its successors and assigns * * * every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States * * *.

" * * *

"And whenever, prior to said time (that is, prior to the time the line of road was definitely fixed and plat filed), any of said sections shall have been * * * otherwise disposed of, *other lands* shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior * * *.

Section 6 (after requiring a survey 40 miles in width) :

" * * * *the odd sections of land hereby granted shall not be liable to sale, or entry, or preemption before or after they are surveyed, except by said company,* as provided by this act; but the provisions of the (pre-emption and settlement laws) shall be, and the same are hereby, extended *to all other lands* on the line of said road, when surveyed, *excepting those hereby granted to said company.* * * *" (Emphasis supplied.)

The joint resolution also created a second indemnity strip between 50 and 60 miles on either side of both the old line of road created between Lake Superior and

Puget Sound by the Act of 1864, and the new line of road between Portland and Puget Sound created in 1870, with one limitation. A replacement selection could be made in the second indemnity strip only within the same state or territory for which there was a deficiency in the basic charter or grant for that state or territory.

Again, it should be noted that if we looked only to the Sections 3 and 6 in construing the Joint Resolution, the newly granted "place lands" between Portland and Puget Sound would never be subject to settlement and preemption except by appellee, whereas indemnity lands were at all times subject to settlement and preemption like other lands. However, we have before us the foregoing debates from which Congress thereafter added the settlement and preemption proviso, specifically restricting the proviso to the "lands hereby granted" by the resolution between Portland and Puget Sound. The settlement and preemption proviso upon which these appellants rely, stated in part:

" * * * Provided, that all lands *hereby granted* to said company * * * shall be subject to settlement and preemption like other lands * * *". (Emphasis supplied.)

The foregoing legislative history is convincing that it was intended by Congress to apply this proviso only to the additional lands between Portland and Puget Sound granted by the resolution.

In authorizing the new line of road in 1870 between Portland and Puget Sound, Congress specified that it

should be under the same terms and conditions as the original granting act for the line between Lake Superior and Puget Sound, thereby defining between Portland and Puget Sound the same "place limits" and the same "first indemnity strip."

By that time, however, the place limits and the first indemnity strip obviously were not adequate to satisfy the quantity of land granted in 1864 to subsidize the old line, and might not satisfy the quantity granted in 1870 for the new line between Portland and Puget Sound. To that end, Congress in the act of 1870 added the "second indemnity strip" for both the old line authorized in 1864, and the new line in 1870.

Patent to a section in the second indemnity strip in Montana required first, a grant in the "place limits" in Montana in the act of 1864, and second, of equal importance, the grant in 1864 of a right of indemnity in the event of a deficiency in the amount of lands in the "place limits" in Montana contemplated by the act of 1864. Whether title was ever acquired to land in an indemnity strip depended upon the later acts of survey, selection by appellee, and administrative determination of the status of title as of the date of selection. The right to acquire title, however, the source of the title was the act of 1864 and vested when the map of definite location was filed.

The act of 1870 did not purport to grant any lands to the Railroad Company in Minnesota, North Dakota, Montana, Idaho, or Western Washington. The source of title for all lands in such states or territories was still

the full amount of the original subsidy granted by Congress in the act of 1864. The act of 1870 did nothing more than authorize an additional second indemnity strip out of which the original grant of 1864 might be satisfied.

It may be helpful to examine an excerpt from the Joint Resolution which provided in part:

“Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, that the Northern Pacific Railroad Company be, and hereby is, authorized * * * to locate and construct, under the provisions and with the privileges, grants, and duties provided for in its act of incorporation, its main road to some point on Puget Sound, * * *; and *in the event of their not being in any state or territory* in which said main line or branch may be located, at the time of the final location thereof, *the amount of lands per mile granted by Congress to said company, within the limits prescribed by its charter*, then said company shall be entitled, under the directions of the Secretary of the Interior, to receive so many sections of land belonging to the United States, and designated by odd numbers, in such state or territory, within 10 miles on each side of said road, beyond the limits prescribed in said charter, as will make up such deficiency, on said main line or branch, * * *: Provided, that all lands *hereby granted* to said company * * * shall be subject to settlement and preemption like other lands, * * *.” (Emphasis supplied.)

How can the appellants seriously urge that by the foregoing language Congress was making a grant of land in the second indemnity strip in Montana?

The full quantity of lands granted in Montana was fixed as of July 2, 1864. Title to all lands “hereby granted” in the place limits in Montana vested as of July 2,

1864, and was determined as of the date the map of definite location was filed. The right to be indemnified for any deficiency was founded in the act of 1864. The amount for which the railroad was to be indemnified in Montana was determined as of the date that the map of definite location was filed. No title vested in the Railway Company to a single acre of land in Montana by the grant contemplated by the Act of 1870. The only land granted by the Act of 1870 was land between Portland and Puget Sound.

D. *Decisions Defining The Nature And Extent Of The Grants To The Railroad Company.*

Many decisions of the Supreme Court of the United States have discussed specifically the Northern Pacific land grants, and other identical land grants. We cite a few only of the cases which we feel will corroborate the foregoing analysis of the grants.

Nelson v. N. P., 1903, 23 S. Ct. 302,
188 U.S. 108, 47 L. Ed. 406;

N. P. v. Townsend, 1903, 23 S. Ct. 671,
190 U.S. 267, 47 L. Ed. 1044;

U. S. v. N. P., 1904, 24 S. Ct. 330,
193 U.S. 1, 48 L. Ed. 593;

U. S. v. N. P., 1920, 41 S. Ct. 439,
256 U.S. 51, 65 L. Ed. 825;

U. S. v. N. P., 1940, 61 S. Ct. 270,
311 U.S. 317, 85 L. Ed. 210; *see later action*
in 41 F. Supp. 273.

See also:

Russell v. N. P., 9th C.C., 238 F. (2d) 636,
cert. denied June 24, 1957, 77 S. Ct. 1400.

In addition to citing the foregoing decisions, we shall discuss in some detail later on in this brief the decision in 1940 commonly called the "Land Grant Case of 1940," and we shall also discuss in more detail the recent decision by this Ninth Circuit Court of *Russell v. The Texas Company et al*, 9th C.C., 238 F. (2d) 636, cert. denied June 24, 1957, 77 S. Ct. 1400, both of which in our opinion dispose of this litigation.

E. *Decisions Reflecting That The Only Lands Granted By The Resolution Were Between Portland and Puget Sound.*

Appellants would have the court ignore the repeated statements in various decisions that describe the lands granted by the resolution of 1870 as the lands between Portland and Puget Sound; that discuss the lands granted by the act of 1864 as all lands east of the Portland-Puget Sound line; and that have decided that the language "lands hereby granted" means those "place lands" contemplated by Sections 3 and 6 for which title passed in praesenti as of the date of the granting act, and not to the indemnity lands. Such decisions are helpful and point the way in these cases. Appellants have cited, and can cite, no authority to the contrary.

1. In *Prest v. N. P.*, May 23, 1884, 2 L. Dec. 506, Secretary Teller stated:

"Lands within indemnity limits are not granted lands. The company as to those lands does not claim to acquire title until actual selection. (Pp. 506.)"

"These are instances of construction put upon withdrawals within granted limits. If any distinction is to be made it seems to me that the withdrawal of land *within indemnity limits* should be more strictly construed against the grantee than a withdrawal *within granted limits*. * * * Under the scheme of the granting act to the Northern Pacific Company which designates indemnity limits, and under the provision in the act that lands in lieu of those lost in place shall be selected 'under the direction of the Secretary of the Interior,' it has come to be regarded as the duty of the Secretary to withdraw from other disposition *a sufficient quantity of lands within indemnity limits to make good those lost in granted limits*. (Pp. 507-508.)

* * *

"In the latter case the lands were *within the granted limits*. In the Ryan case the land was *within indemnity limits*, * * *." (Pp. 510.)

Title to lands in the place limits vested immediately as of the date of the legislation. They were lands "hereby granted," whereas title to lands in the indemnity limits might never vest in the Railway Company.

2. Again, in discussing the indemnity lands of the Northern Pacific Railway Company, and the power of executive withdrawals, 2 L. Dec. 511, May 17, 1883, Secretary Teller stated:

"In many instances acts making grants in aid of the construction of railroads provide for an executive withdrawal of the lands *within the granted limits*. These acts do not, however, generally provide for the executive withdrawal of lands *within the indemnity limit* * * *.

"Now, with respect to the definite location, the law *makes absolute grant, with precision from that*

date as to particular lands, because those lands are immediately identified as a whole—being the alternate sections on each side of said road. The circumstances or status of each tract—whether ‘vacant’ or ‘appropriate’—can then be ascertained. When ascertained it either falls within the grant as of its date or fails to pass on account of such exception as the law declares.

“As to indemnity, the law gives at date of definite location, not title but a right to acquire title by selection—based on the deficiency ascertained as above. And the provision of 1870 rests on a possibility that at date of definite location there may be in some state or territory a want of sufficient lands in the limits fixed in 1864, on account of subsequent disposals, to make the full original grant, and allows the deficiency thus caused to be supplied beyond the original limits.” (*Pp. 513-514, Pp. 515.*)

3. On September 30, 1887, in *Northern Pacific v. McRae*, 6 L. Dec. 400, Secretary Lamar discussed the extent of the grant between Portland and Puget Sound, basing authority for it solely in the later resolution of 1870:

“Now, the grant provided for in its act of incorporation is every alternate section of public land not mineral (except coal and iron) designated by odd numbers to the amount of twenty alternate sections per mile on each side of said railroad line, through the Territories of the United States, and ten sections per mile on each side of said railroad whenever it passes through any State.

“I am clearly of the opinion that by the joint resolution of May 31, 1870, Congress intended *that the grant* of twenty sections per mile on each side of the road to aid in the construction of said road should be extended to the whole line of the road including that part of the main line via the valley of the Columbia river through Portland to Puget Sound. This

conclusion based alone upon the language of the joint resolution would be confirmed, if confirmation was necessary, by the debates in Congress upon said resolution while it was pending and make clear the manifest purpose of said resolution.

“(Quoting from the significant debates in Congress.)”

4. To the same effect as the foregoing is the decision of *Northern Pacific Railroad Company v. Davis*, July 25, 1894, 19 L. Dec. 87.

5. In discussing the conflicting grants between the Northern Pacific and the Oregon & California Railroad Company, Secretary Noble, February 17, 1892, in 14 L. Dec. 187, stated :

“It will be seen that the effect of said resolution was to change the branch to main line, and vice versa, *and also to provide for a land grant for the new line—viz: a connecting piece between Portland, Oregon, and Puget Sound.* (Pp. 188) * * *”

“In your instructions to the Register and Receiver at Oregon City, Oregon, dated January 19, 1891, (not reported), under the forfeiture act, it was held by you that, *east of Portland, Oregon, the grant for the Northern Pacific Railroad Company is under the Act of July 2, 1864* (supra), (Pp. 188) * * *

“The Act of 1864 made the location of the grant therein provided for, in this vicinity, reasonably certain, and the location of 1865 imparted additional information upon the subject. The Joint Resolution of 1870 merely changed the name of this part of the line, by designating it as the main line, instead of the branch line, *but the grant remained under the Act of 1864, (Pp. 189-190)* * * *. This applies with equal force in the present controversy, and having determined that the grant for the Northern Pacific Railroad Company, east of Portland, Oregon, is under the Act of July 2, 1864 * * *.” (Pp. 190).

6. Secretary Smith, March 21, 1894, in *18 L. Dec.* 255, said:

"The original grants made by the Act of Congress, approved July 2, 1864 (13 Stat., 365), provided for a branch line terminating at Portland, Oregon.

"*By the Resolution of May 31, 1870 (16 Stat., 378), this grant was made to apply to the line provided for by the Resolution of April 10, 1869 (16 Stat., 57), which provided for an extension of the branch line from Portland to Puget Sound.* It is true that the Resolution of May 31, 1870 (*supra*), changed the branch line to the main line, and provided for a continuous line to Puget Sound by way of Portland, *but this Department has always held that there are two grants, and that the grant from Portland north was made by the Resolution of May 31, 1870.*"

7. Prior decisions of the Supreme Court have clearly shown that no lands were granted by the Joint Resolution of 1870, except those in aid of the Portland-Tacoma line.

In *United States v. Northern Pacific Railroad Company*, 1894, 14 S. Ct. 598, 152 U.S. 284, 38 L. Ed. 443, the Court held that the Joint Resolution "should be regarded as giving a subsidy of lands in aid of the construction of a *new* road, not before contemplated, that would directly connect Portland and its vicinity with Puget Sound."

8. In *Northern Pacific Railway Company v. DeLacey*, 1899, 19 S. Ct. 791, 174 U.S. 622, 43 L. Ed. 1111, the land in controversy was within the primary limits of the 1870 land grant for the Portland-Tacoma line as definitely located, and the 1864 Cascade Branch, as definitely located across the Cascade Mountains to Puget

Sound. The Court held that the Company acquired title to the land under the 1864 Act. It said (*Pp. 628*):

"The defendant contends that the land in controversy was excluded by operation of law from the grant of 1864 by the resolution of May 31, 1870. Herein he assumes that the effect of that resolution was to blot out the grant under the act of 1864. The resolution did not have that effect. It was not an amendment to the third section of the act of 1864 which granted the lands."

9. In *Hewitt v. Schultz*, 1901, 21 S. Ct. 309, 45 L. Ed. 463, 180 U.S. 139, the Court said:

"An answer to these questions may be found in the act of July 2d, 1864, as interpreted by the Land Department for many years past. We will now advert to such of the provisions of that act as are pertinent to the present inquiry.

"By the 3d section of the act Congress granted to the Northern Pacific Railroad Company (quoting section 3).

"This section has been often under examination by this court, and in repeated decisions it has been held that the act of Congress 'granted to the Northern Pacific Railroad Company *only* public land to which the United States had full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time its line of road was definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office,'—lands that were not, at that time, free from pre-emption or other claims or rights being excluded from the grant. (Citing many cases.); and authorities cited in each case. The cases all speak of the granted lands *as those within the place limits.*" (*21 S. Ct. at 311.*)

10. In *United States v. Northern Pacific*, 1904, 24 S. Ct. 330, 193 U.S. 1, 48 L. Ed. 593, the Court, after cit-

ing the Act of 1864 as making a grant in aid of the construction of a railway from Lake Superior to some point on Puget Sound, said:

"On May 31, 1870, Congress passed a joint resolution making an additional grant to the same company for the location and construction of 'its main road to some point on Puget Sound via the valley of the Columbia River, with the right to locate and construct its branch from some convenient point on its main trunk line across the Cascade Mountains to Puget Sound.'" (16 Stat. at Large 378.)

"The line east of Portland provided for in the Act of 1864 formed nearly a right angle at Portland with the line from there to Puget Sound provided for in the Joint Resolution, and thus the two grants overlapped, and the lands in suit fell within the overlap. * * * While the line from Portland to Puget Sound and east across the Cascade Mountains was built and the grants earned."

11. In the Land Grant Case of 1940, the *United States v. Northern Pacific Railway Company*, 1940, 61 S. Ct. 264, 85 L. Ed. 210, 311 U.S. 317, the court so held. Since we shall discuss the case fully later on, we shall not duplicate here.

12. In *Russell v. Texas Company*, 9th C.C., 238 F. (2d) 636, cert. denied June 24, 1957, 77 S. Ct. 1400, this Court described the grant of 1870 as follows:

" * * * In 1870, Congress passed a resolution which * * * granted additional lands in Oregon and Washington to the Company."

13. *Argument of Appellants.*

We respectfully submit that the foregoing constitute an abundance of authority reflecting that the Joint Reso-

lution granted no lands in Montana. The source of title to lands in Montana is the original act of 1864. The only lands granted by the resolution of 1870 were between Portland and Puget Sound.

Appellants, at pages 22 and 23 of their brief, cite authorities which we feel support this view. Indemnity lands in any state are acquired as a part of the basic grant for the state in which they are acquired. Indemnity lands in Minnesota, North Dakota, Montana, Idaho, and Western Washington are acquired as a part of the 1864 grant. The only indemnity lands acquired as a part of the 1870 act are between Portland and Puget Sound. In this connection the appellants state:

"The railroad company was to receive a specified amount of land measured by the primary provision of the grant relative to the place lands. The only purpose apparent for the indemnity provision was to replace lands which were for some reason not available in the place limits. When those lands were acquired they obviously become as much a part of the grant as were the lands within the place limits. In the case of *United States v. N.P. Railway Co.*, 256 U.S. 51, 41 Sup. Ct. 439, 65 L. Ed. 825, 828, we find the following language of the Supreme Court of the United States demonstrating this proposition:

"The provision relating to indemnity lands *was as much a part of the grant* and contract as the one relating to land in place (*Payne v. Central P.R. Co.* 255 U.S. 288, ante, 598, 41 Sup. St. Rep. 314), and it is apparent from the granting act and resolution that "it was the purpose of Congress in making the grants to confer a substantial right to land within the indemnity limits in lieu of lands lost within the place limits." *Weyerhaeuser v.*

Hoyt, 219 U.S. 380, 387, 55 L. Ed. 258, 261, 31 Sup. Ct. Rep. 300.' (Emphasis supplied)

"This proposition is also supported by the case of Southern Pacific Railroad Co. v. Bell, 22 Sup. Ct. 232, 183 U.S. 679, 46 L. Ed. 386, and by the very quotation from that case which is set forth in the opinion of the court below (R. 28).

" ' * * * *Undoubtedly the company acquires title to both classes of lands by the 3d section of the granting act; but it acquires a title to lands within the place limits by a present grant; but to land within the indemnity limits, only by a future power of selection. In both cases the statute is the origin of the title; but in the one case it gives instantaneously; in the other it is a mere promise to give in the future, and requires the action of the railroad to perfect it. The words "hereby granted" evidently refer to the former.*' (Emphasis supplied)."

The foregoing quotation from pages 22 and 23 of appellants' brief states our position with clarity. The Joint Resolution made an additional grant of lands in the place limits between Portland and Puget Sound; gave a right of indemnity in the event of a deficiency; and defined both a first and a second indemnity strip out of which the grant could be fulfilled.

As to the lands east of the Portland-Puget Sound line, the company acquired no title under the Joint Resolution. Before appellee was given a patent by the United States to any lands in the "second indemnity strip" in Montana, there had to be first a grant of place lands in Montana by the act of 1864; and second, a grant in the act of 1864 of the right of indemnity in the event of a deficiency in the grant for the place limits. As stated by the Supreme

Court of the United States in the Forest Reserve Case, *U. S. v. N. P.*, 41 S. Ct. 439, 256 U.S. 51, 65 L. Ed. 285, in *Payne v. Central Pac. R. Co.*, 41 S. Ct. 314, 255 U.S. 228, 65 L. Ed. 598, and *Southern Pacific v. Bell*, 22 S. Ct. 232, 183 U.S. 679, 46 L. Ed. 386, the source of the title to all lands in Montana was the act of 1864; the company acquired title to both place and indemnity lands in Montana by the 3rd section of the act of 1864; in both cases, the act of 1864 was the origin of the title.

Paraphrasing the statement at page 22 of appellants' brief, the railroad company by the act of 1864 was to receive a specified amount of land measured by the primary provision of the grant relative to the place lands in Montana. The only purpose for the indemnity provision was to replace lands which were granted by the act of 1864 in the place limits in Montana, but which were for some reason unavailable in those limits. When those lands in Montana were acquired, whether first or second indemnity, they were as much a part of the grant of 1864, as were the lands within the place limits. In all three cases—place, first indemnity, or second indemnity—the act of 1864 was the origin of the title.

F. *Decisions Reflecting That The Restrictive Language Of The Resolution Of 1870—"all lands hereby granted"—Did Not Contemplate Land In Montana.*

It is not only our view that the resolution granted no lands in Montana, but it is also our view that when Congress used the restrictive language limiting the settlement and preemption proviso to "all lands hereby granted,"

it contemplated only those lands within the place limits between Portland and Puget Sound to which title passed in praesenti as of the date of the resolution. Once again the appellants would have the court ignore the decisions construing the meaning of such language. Appellants, of course, cite no cases to the contrary.

In *Hewitt v. Schulz*, 21 S. Ct. 309, 45 L. Ed. 463, 180 U.S. 139, decided on January 7, 1901, the court had to expressly decide what lands Congress contemplated and intended by the language "lands hereby granted" as used in sections 3 and 6 of the Act of 1864. The court held that only the place lands, title to which passed in praesenti as of the date of the act, were contemplated. Such language did not apply to indemnity lands. Hewitt, homestead patentee, filed suit in ejectment against Schultz, a purchaser from the N. P. R. Co. which asserted ownership by reason of the land grant act. The land involved was within the first indemnity strip in the Territory of North Dakota. The opinion relates the history with reference to the definite location of the road. A map designating the general route was filed March 30, 1872. On April 22, 1872, the Secretary of Interior ordered a withdrawal of all lands in the place limits shown on the map of general route. On June 11, 1873, map of definite location was filed. On June 24, 1873, the land department ordered a withdrawal of all lands in the first indemnity strip. The land in dispute was located in that first indemnity strip. On April 10, 1882, Hewitt settled on the lands and thereafter qualified for a patent unless he was

barred from doing so by the earlier withdrawal order of June 24, 1873. No selection had been made by the company before April 10, 1882. In fact it was not until March 19, 1883, that the company filed its "selection list" embracing the land involved. The Department of the Interior relying on *N. P. v. Miller*, 7 L. Dec. 100, and *N. P. v. Davis*, 19 L. Dec. 87, held that the lands in the indemnity limits did not fall within the place or granted limits, were not included in the term "hereby granted" as used in Sec. 6 of the act of July 2, 1864, and were open to settlement under the public land laws until a selection had been made by the company. Patent was issued to Hewitt. The ejectment action followed. The Supreme Court of the United States quoted Section 3 of the act of July 2, 1864, and thereafter said:

"This section has been often under examination by this court, and in repeated decisions it has been held that the act of Congress '*granted* to the Northern Pacific Railroad Company *only* public land to which the United States had full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights *at the time its line of road was definitely fixed*, and a plat thereof filed in the office of the Commissioner of the General Land Office,'—lands that were not at that time, free from pre-emption or other claims or rights being excluded from the grant. (Citing many cases.) The cases all speak of the granted lands as those within the place limits."

The court next quoted section 4 of the act of July 2, 1864, following which it said with respect to Section 6:

"But so far as the present case is concerned the

most material section of the act is the 6th. That section provided: (Quoting Section 6) * * *.

"It is contended that, construing the 3d and 6th sections together, it is clear that the words, 'the odd sections of land hereby granted,' in the first part and the word 'excepting those hereby granted to said company,' in the latter part, of the 6th section, refer to the lands described in the 1st section of the act,—that is, to the odd-numbered sections in the place limits which were free from pre-emption or other claims or rights, and had not been appropriated by the United States prior to the definite location of the road; that as to 'all other lands on the line of the said road, when surveyed,' the act expressly declares that the provisions of the pre-emption act of 1841 and the acts amendatory thereof, and of the homestead act of 1862, should extend to them; that Congress took pains to declare that it did not exclude from the operation of those statutes any lands except those granted to the company in the place limits of the road, which were unappropriated when the line of the railroad was definitely fixed; and that if, at the time such line was 'definitely fixed,' it appeared that any of the lands granted, that is, lands in the place limits, had been sold, granted, or otherwise appropriated, then, but not before, the company was entitled to go into the indemnity limits beyond the 40-mile and within the 50-mile line, and, under the direction of the Secretary of the Interior, and not otherwise, select odd-numbered sections to the extent necessary to supply the loss in the place limits. It is also contended that the object of the reference in the 6th section of the Northern Pacific act to the pre-emption and homestead acts could only have been to bring the odd-numbered sections in the indemnity limits within the operation of those acts.

"This construction of the act of July 2d, 1864, finds support in legislation enacted subsequently and before the railroad company filed its map of general route. By a joint resolution approved May 31st, 1870,

Congress declared (quoting from the Joint Resolution).

"Thus, it seems, a second indemnity limit was established into which the company could go and obtain lands in lieu of lands lost to it in the granted or place limits."

The court next discussed prior opinions of the Land Department including *Atlantic & P. R. Co., Aug. 13, 1887, 6 L. Dec. 84*, and quoted from *N. P. R. Co. v. Miller, 7 L. Dec. 100*, cited above. The court then held:

"It was admitted at the hearing that the construction of the Northern Pacific act of 1864 announced by Secretary Vilas had been adhered to in the administration of the public lands by the Land Department. We are now asked to overthrow that construction by holding that it was competent for the Land Department, immediately upon the definite location of the line of the railroad, to withdraw from the settlement laws all the odd-numbered sections within the indemnity limits as defined by the act of Congress. If this were done, it is to be apprehended that great if not endless confusion would ensue in the administration of the public lands, and that the rights of a vast number of people who have acquired homes under the pre-emption and homestead laws, in reliance upon the ruling of Secretary Vilas and his successors in office, would be destroyed. Of course, if the ruling of that office was plainly erroneous, it would be the duty of the court to give effect to the will of Congress; for it is the settled doctrine of this court that the practice of a department in the execution of a statute is material only when doubt exists as to its true construction.

"But without considering the matter as if it were for the first time presented, it is sufficient to say that the question before us cannot be said to be free from doubt. The intention of Congress has not been so clearly expressed as to exclude construction or argument in support of the view taken by Secretaries La-

mar, Vilas, and Smith, and upon which the Land Department has acted since 1888. 'It is the settled doctrine of this court,' as was said in *United States v. Alabama G.S.R. Co.* 142 U.S. 615, 621, 35 L. Ed. 1134, 1136, 12 Sup. Ct. Rep. 308, 'that, in case of ambiguity, the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and, if such construction be acted upon for a number of years, will look with disfavor upon any sudden change, whereby parties who have contracted with the government upon the faith of such construction may be prejudiced.' These observations apply to the case now before us, and lead to the conclusion that if the practice in the Land Department could with reason be held to have been wrong, it cannot be said to have been so plainly or palpably wrong as to justify the court, after the lapse of so many years, in adjudging that it had misconstrued the act of July 2d, 1864. The order of withdrawal by the Secretary of the Interior, upon which the title of the railroad company depends, being out of the way, there is no legal ground to question the title of the plaintiff to the land in dispute."

It is noted that there was a dissent in the case of *Hewitt v. Schultz*. For that reason the subsequent opinion of the court in *Southern Pacific Railroad Company v. Bell*, January 13, 1902, 22 S. Ct. 232, 183 U.S. 679, 46 L. Ed. 386, is important. That case involved the Southern Pacific land grant, an Act on July 27, 1866, a land grant identical with that of the Northern Pacific. Because of the importance of the issue involved, the court reviewed the *Hewitt v. Schultz* case, reviewed the entire background of the issue, and specifically and expressly affirmed the decision. In the Southern Pacific case, the

land was within the indemnity limit in a state rather than a territory. The court said in part:

"Treating this case as a reargument of the question involved in *Hewitt v. Schultz*, and it practically comes to that, we still adhere to the principle there announced. It seems to us the more reasonable, if not the necessary, inference to be deduced from the language of Sections 3 and 6. By the former there is '*hereby granted* . . . every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state.' These words terminate the grant, the remainder of the clause being immaterial in this connection, and if the whole clause had been followed by a period, instead of a semi-colon, the meaning, perhaps, would have been clearer. But there follows another clause, that 'whenever, prior to said time, any of said sections, or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be *selected* by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than 10 miles beyond the limits of said alternate sections,' etc. There is here a clear distinction between the lands granted *in praesenti* by the company, whenever the deficiency in the granted lands shall be ascertained.

"The 6th section carries out the same idea. It requires a survey of 40 miles in width on both sides of the entire line, whether passing through states or territories. This would include only the granted or place limits within a territory, but within a state would cover the indemnity limits as well. There was no order in the act to withdraw any lands from settlement or sale, but such withdrawal seems to have been made in pursuance of the practice of the Interior Depart-

ment, and for the purpose of preventing lands granted to the railroad company from being taken up by settlers, before the completion of the line and the final issue of patents. As was said by Mr. Secretary Lamar in the Atlantic & P. R. Co. 6 Land Dec. 84: 'Waiving all questions as to whether or not said granting act took from the Secretary all authority to withdraw said indemnity limits from settlement, it is manifest that the said act gave no special authority or direction to the executive to withdraw said lands; and when such withdrawal was made it was done by virtue of the general authority over such matters possessed by the Secretary of the Interior, and in the exercise of his discretion; so that, were the withdrawal to be revoked, no law would be violated, no contract broken.' But as the power to withdraw extends only to the '*lands hereby granted*' and all other lands, except those hereby granted, remain open to settlement, we are thrown back upon Sec. 3 to determine what are the lands '*hereby granted*.'

* * *

"We are therefore of opinion that the act of July 27, 1866, did not authorize the withdrawal by the Secretary of the Interior of the indemnity lands, that such lands remained open to homestead and preemption entry, and that patents issued to settlers within such indemnity limits, based upon the entries made prior to the selection by the railroad company, approved by the Interior Department, were valid as conveyances of the land as against the selection by the railroad company."

In view of the foregoing decisions, it is manifestly clear that the language "*hereby granted*" in the settlement and preemption proviso of the resolution applied only to the "*place lands*" in the new and additional grant between Portland and Puget Sound. It did not apply to any lands in Montana.

G. *Decisions Which Have Considered and Passed Upon Whether The Settlement And Preemption Proviso Applies To Any Lands In Montana.*

We do not accept nor agree with the suggestion of appellants that the basic issue involved has not been decided. We submit that it has been decided by the Supreme Court of the United States followed by a pertinent decision of this Ninth Circuit Court.

1. *United States v. N. P.*, 1940, 61 S. Ct. 264, 311 U.S. 317, 85 L. Ed. 210.

Both the 1864 act, and the resolution of 1870, were altered and amended by Congress by the Act of June 25, 1929 (46 Stat. 41, 43 U.S.C.A., Sections 921-929). The Attorney General was directed to procure a judicial determination of all controversies and disputes arising out of the Act of 1864 and the Joint Resolution of 1870. Pursuant to the mandate, an action was commenced against the Northern Pacific Railway Company which was thereafter litigated and decided in *United States v. Northern Pacific Railway Company*, 1940, 61 S. Ct. 264, 311 U.S. 317, 85 L. Ed. 210. The government argued in that case that the settlement and preemption proviso applied to all lands between Lake Superior and Puget Sound, including those in the second indemnity limits; that when the Railway Company failed to open all lands to settlement and preemption, it thereby breached its contract with the government with respect to the land grant. The government urged the breach in two separate and distinct aspects: first, that it was one of six breaches which, either

standing alone or considered together with the other alleged breaches, was so substantial that the Railway Company was not entitled to any further performance by the government; second, that in any event the government was entitled to a determination of the amount of damages sustained from the breach by way of set-off. The court first discussed the legislative history of the land grant, and the nature and extent of the land grant, pointing out that by the Act of 1864 place lands were granted in prae-senti between Lake Superior and Puget Sound, as well as a first indemnity strip, and that the Joint Resolution of 1870 authorized a new line between Portland and Puget Sound, and made a new grant of land in connection therewith, on the same terms as the original grant. (*61 S. Ct.* 268-273; *311 U.S.* 324-335; *85 L. Ed.* 217-223.) The opinion thereafter discussed the six alleged breaches which the government argued either standing alone, or considered all together, disentitled the Railway Company to any further performance (*61 S. Ct.* 273-276, *311 U.S.* 335-342, *85 L. Ed.* 223-226). Paragraph 4 constituted the first aspect in which the government relied upon the alleged breach of the settlement and preemption proviso of 1870 (*61 S. Ct.* at 273, *311 U.S.* at 337, and *85 L. Ed.* at 224). At the conclusion of its discussion of those six alleged substantial breaches, including paragraph 4, the opinion then said:

“The justices who heard this case are equally divided in opinion upon these issues. No opinion is expressed upon them, and they are reserved, in view

of the fact that our rulings on other issues may be dispositive of the entire controversy.

“The Government puts forward certain further claims which, if sustained, would preclude any recovery by the company.” (*61 S. Ct. at 275-276, 311 U.S. at 341-342, 85 L. Ed. at 226.*)

The decision went on to discuss those other issues which the court felt might dispose of the entire controversy. Among those, paragraph 18 was the second aspect in which the government urged that the settlement and preemption proviso applied to all lands between Lake Superior and Puget Sound, including second indemnity lands, and that the government was entitled to a determination of the damages sustained by way of set-off. The Court held unequivocally with respect to that argument:

“18. The company’s failure to open lands granted by the Resolution of 1870 to settlement and preemption.

“The company’s alleged breach in this aspect as a defense to the company’s entire claim is mentioned in heading 4, *supra*.

* * *

“*We hold*, contrary to the Government’s assertion, that the proviso of the Resolution of 1870, requiring the lands be opened by the company to settlement and preemption applies only to the *additional lands granted by that Resolution* (emphasis supplied) and not to lands acquired under the grant of 1864. * * *

* * *

“A majority of the justices who heard this case are of the opinion that the proviso of the Resolution of 1870 required the company to open the lands *granted*

by the Resolution (emphasis supplied) to preemption and settlement at the expiration of five years from the completion of the entire road in 1887, whether the lands were then subject to mortgage or not; * * *." (61 S. Ct. 287-288, 311 U.S. at 367-369, 85 L. Ed. at 238-239.)

What the Court meant by "the additional lands granted by that Resolution" is elsewhere in the Court's opinion made clear, and is reflected in the many decisions referred to above. The Court said of the Joint Resolution:

a.) "May 21, 1870 * * *. It further authorized the location and construction of the main railroad via the valley of the Columbia River to Puget Sound and of a branch from the main line across the Cascade Mountains to Puget Sound, and made a grant of land in connection with the construction authorized between Portland and Puget Sound, on the same terms as the original grant." (61 S. Ct. 269; 311 U.S. at 326.)

b.) "The Resolution of May 31, 1870, granted, as respects the additional line authorized between Portland and Puget Sound, place and indemnity lands, as granted for the original line by the Act of 1864. It also authorized what are spoken of as 'second indemnity belts' * * *." (61 S. Ct. at 270, 311 U.S. at 328.)

c.) "An additional line was authorized by the Joint Resolution of 1870 and a land grant made therefor." (61 S. Ct. at 274, 311 U.S. at 337.)

The Court's understanding that all lands other than those in aid of the Portland-Tacoma line were "lands acquired under the grant of 1864," to which it held the proviso of the Resolution of 1870 inapplicable, is made clear by the Court's discussion of the Company's claim to indemnity resulting from the Tacoma overlap, appeal

No. 4 by the Company (*61 S. Ct. 289-291; 311 U.S. 372-376*). The Court said:

"20. *The company's claim to indemnity resulting from the Tacoma overlap.*

"In its appeal (No. 4) the company challenges the rejection of its claim for loss of selection rights in second indemnity limits appurtenant to the Portland-Tacoma line. It is urged that the Joint Resolution of 1870, *which made a grant in aid of this line*, authorized the creation of second indemnity limits, in the event that there was a deficiency of lands in first indemnity limits, to supply loss of place lands lying along the route. The company insists that when in 1892, 1902 and 1906, 213,000 acres of land were withdrawn and placed in national forests, these withdrawals deprived the company of selection of odd-numbered sections in second indemnity limits, as the 1870 grant was deficient in 1882, the date of the definite location of the last segment of the Portland-Tacoma line, and so remained." (Emphasis Supplied) (*61 S. Ct. at 289, 311 U.S. at 372.*)

The Court after stating:

"For an understanding of the contention certain facts must be borne in mind."

then discussed the nature and extent of the two grants. It stated significantly:

"Thus the resolution altered what had been the proposed main line across the Cascade Mountains into a branch line, and the former branch to Portland into a section of the main line running down the Columbia River to Portland and thence turning north to Puget Sound. Although by an Act of 1869 the company had been authorized to construct a line between Portland and Tacoma, and a right of way had been granted therefor, no grant of lands in aid of such construction was made until the adoption of the Resolution of 1870." (*61 S. Ct. at 289, 311 U.S. at 373.*)

The Court next pointed out that the grant of place lands and indemnity for this new road between Portland and Puget Sound was the same as the grant in the charter act; discussed the authorization for second indemnity, stating that Congress was informed from the legislative history that because of prior settlement and preemption there was a deficiency of lands available to satisfy the original grant, and for that reason a second indemnity strip was authorized; and then said:

"The Resolution made a *new grant* in aid of the Portland-Tacoma line. The portion of the Cascade branch (designated as main line in the Act of 1864) entering Tacoma from the east was definitely located in 1884. This location defined the place lands granted by the Act of 1864. The line authorized by the Joint Resolution entering Tacoma from the south was definitely located in 1874, thus earning the grant made by the Resolution. * * *

"Whether Congress intended, in connection with its *later grant of 1870*, to accord the company indemnity for failure to receive, in aid of the Portland-Tacoma line, lands to which it would get title in virtue of its definite location of the Cascade line, is the question. We conclude that Congress did not so intend.

"It is true that the grant of 1870 was upon the same terms as that of 1864. Unquestionably the company, in respect of the line built under the later grant, was entitled to indemnity for lands granted or disposed of by the United States to others prior to the grant. Indeed, it would be entitled to indemnity for loss due to an earlier overlapping grant to another railroad. The grant of 1864, carried title to the lands within the overlap to the company and, therefore, Congress could not and did not make a second grant of the same lands in 1870. Did Congress intend to grant the company indemnity for a *preceding grant*,

not to a stranger, but to the company itself? * * *.”
 (Emphasis Supplied) (*61 S. Ct. at 290-291, 311 U.S.*
at 374-376.)

In posing and answering this question, the Court clearly considered that all lands opposite the Cascade line were acquired under the act of 1864. We note that the Court cited in explanation of the statement in a footnote, prior opinions quoted from in subdivision E above which held that the resolution did not blot out or amend section 3 of the act of 1864 which granted the lands; that the grant east of Portland was under the act of 1864; that the line north of Portland was granted under the act of 1870; that there were two grants which overlapped; that the resolution gave a subsidy of new lands between Portland and Puget Sound for the construction of a new road not contemplated before.

The Court clearly had in mind that the only additional lands granted by the resolution were lands between Portland and Puget Sound; and held that the proviso applied only to those lands.

The date of construction did not limit the extent of the grants. No such provision can be found in the granting acts.

Furthermore, when the Supreme Court said in the Land Grant Case of 1940, that the proviso of the Joint Resolution applied only to the additional lands granted by that Resolution “and not to lands acquired under the grant of 1864” it certainly did not mean, as appellants argue, that the proviso was limited to those lands earned

by construction prior to May 31, 1870, for it knew that construction did not begin until February 15, 1870, and that no lands had been so earned and certified to the Company on May 31, 1870, the date of the passage of the act.

Accordingly, we respectfully submit that the Government in the Land Grant Case of 1940 urged upon the Supreme Court of the United States that the settlement and preemption proviso of the resolution of 1870 applied not only to the new lands granted by the resolution between Portland and Puget Sound, but that it also applied to all the lands between Lake Superior and Puget Sound, acquired under the act of 1864, including the second indemnity lands involved in these pending cases. The Court held unequivocally that the proviso applied only to the new lands between Portland and Puget Sound granted by the resolution.

2. Following the foregoing decision in 1940, the United States and the Northern Pacific Railway Company adjusted all their differences, and District Judge Swollenbach entered a decree which in effect quieted title in appellee to all lands patented to respondent under the various land grant acts. See *41 F. Supp.* 273, August 28, 1941. The disposition contemplated all damages sustained by reason of any failure to open to settlement or preemption the additional lands granted by the Resolution of 1870.

3. *Russell v. N. P. R. Co., et al*, 9th C.C., 238 F. (2d) 636, cert. denied June 24, 1957, 77 S. Ct. 1400, is a

pertinent decision. In that case, the same counsel represented Russell as represent these appellants. They made the same argument to this Court as the Government made to the Supreme Court of the United States in the Land Grant Case of 1940—that is, that “the lands subject to the proviso were all of the lands of the grant from Lake Superior to Puget Sound, and the same lands which might be subjected to the one ‘mortgage by this Act authorized’.” They made no particular issue of the fact the Russell lands were in the place limits. It was not considered a controlling fact. They supported their position at the time of argument with the same argument now advanced in brief.

Appellee in the Russell case made substantially the same argument as it makes here—that is, that the Resolution of 1870 granted no lands in Montana; that the restrictive language “lands hereby granted” contemplated only the new lands between Portland and Puget Sound granted by the resolution; and that the issue was decided in the Land Grant Case of 1940. In its opinion this Court described the grant of 1870 as a grant of “additional lands in Oregon and Washington.” This Court rejected the argument that the Resolution of 1870 made a grant of lands in Montana. It accepted the argument of appellee that the Joint Resolution granted no lands in Montana.

After so defining the grant of 1870 as a grant of additional lands in Oregon and Washington, this Court discussed the opinion of the District Judge that the issue had

been decided by the Supreme Court of the United States, and by way of explanation in footnote 4 said:

"4. United States v. Northern Pacific Railway Co., supra, grew out of an action which the government brought against the Northern Pacific Railway Co. to recover damages, *inter alia*, for the wrongful disposition of some of the lands granted it in 1864 and in 1870, claiming that the proviso clause in the Resolution of 1870 applied to all the lands granted in 1864 as well as the additional lands granted in 1870. The Supreme Court in an opinion by Mr. Justice Roberts stated 311 U.S. at page 368, 61 S. Ct. at page 287:

"We hold, contrary to the Government's assertion, that the proviso of the Resolution of 1870, requiring that the lands be opened by the company to settlement and preemption applies only to the additional lands granted by that Resolution and not to lands acquired under the grant of 1864. * * *

"The court then added in a footnote that the legislative history was so convincing that it could reach no other conclusion." (238 F. (2d) at 639.)

After holding Russell barred by estoppel, this Court then held significantly:

"Even if we felt constrained to recognize the right of Russell to raise the question of the validity of the mineral reservation by virtue of the two granting acts, we are convinced that the holding in United States v. Northern Pacific Railway Co., 1940, 311 U.S. 317, 61 S. Ct. 264, 85 L. Ed. 210, is determinative of this issue." (238 F. (2d) 640-641.)

In view of the nature of the briefs and arguments in the Russell case, we consider the opinion as significant authority in support of the appellee in these pending cases. The fact that the Russell lands were in the "place limits"

whereas these lands are in the "second indemnity limits" did not influence Russell's argument or brief, nor his basic position. He argued that the appellee did not acquire title to any lands in Montana by the Act of 1864; that by the Resolution of 1870 Congress gave a new and increased title by removing the mortgage restriction of the Act of 1864; that by acceptance of the Resolution of 1870 there was a regrant of all the lands; and that the settlement and preemption proviso applied to all lands regardless of whether they were place or indemnity. It was substantially the same argument as the government had previously advanced in the Land Grant Case of 1940.

When this Court held that the only lands granted by the Resolution of 1870 were the additional lands in Oregon and Washington it effectively disposed of the Russell case and these pending cases.

Accordingly, we respectfully submit that not only has the Supreme Court of the United States determined exactly the same issue with respect to these same indemnity lands in the land grant case of 1940, this Ninth Circuit Court has decided a basic issue by holding in the Russell case that the only lands granted by the Resolution of 1870 were the additional lands in Oregon and Washington.

ANSWER TO ARGUMENT OF APPELLANTS

The foregoing discussion answers most of the argument advanced by appellants and we shall not burden this brief with a step by step refutation of all points.

With respect to the discussion of the Land Grant Case

of 1940, we simply submit that appellants misconstrue and misstate what was actually considered and held by the Court in that case. As above pointed out, the Court did hold definitely that the resolution granted additional lands between Portland and Puget Sound, that the proviso "applies only to the additional lands granted by that resolution and not to lands acquired under the grant of 1864." The only point upon which it reserved decision was whether the Company's breach of the proviso by refusal to open lands subject thereto to settlement and pre-emption, together with other breaches of covenant claimed by the Government, had been so substantial as to disentitle it to call for further performance by the United States, or to recover any money compensation for abrogation of its selection rights. The statements on page 31 of the appellants' brief that "the Court reserved the question as to whether the *proviso* applied to every part of the granted lands on the issue of forfeiture of right to further awards of lands" and that the Court "did not attempt to delineate the lands which were 'acquired' by Northern Pacific under the Act of 1864," are clearly incorrect, for the Court expressly held the proviso applicable only to the additional lands granted by that resolution between Portland and Puget Sound.

The appellants advance no substantial reason for doubting the correctness of the construction placed on the proviso by the Supreme Court in its 1940 decision or the controlling effect of that decision upon this litigation.

With respect to the argument that appellee has a positive duty to convey to these appellants, it is based first of all on the erroneous assumption that the proviso applies to lands in Montana. In the second place, it assumes rights in appellants which they do not have.

The proviso, obviously, is not self-executing, and it does not purport to confer rights on anyone but the United States. The lands subject to the proviso were granted to the Railroad Company in fee, but subject five years after completion of the entire road "to settlement and preemption like all other lands." Since other lands subject to settlement and preemption were only unappropriated public lands, the proviso was nothing more than a reservation by the United States of a power of disposition under the preemption and homestead laws, with an implied covenant on the part of the Railroad Company to permit such disposition. While a refusal to open lands subject to the proviso to preemption and settlement at the expiration of the five-year period, would constitute a breach of the Company's contract with the United States, only the United States could complain thereof. This was so decided in *Oregon & Cal. R. R. v. United States*, 238 U.S. 393, at pages 431-436, 35 St. Ct. 908, 59 L. Ed. 1360, in respect of a much more specific proviso "That the lands granted by the act aforesaid shall be sold to actual settlers only, in quantities not greater than one quarter section to one purchaser and for a price not exceeding two dollars and fifty cents per acre."

As a matter of interest, it is noted that Northern Pacific Railroad Company did not open the lands granted by the Joint Resolution to preemption and settlement at the expiration of five years from the completion of the entire road, because those lands remained subject to the mortgages authorized by the Resolution, and it construed the proviso as subjecting to settlement and preemption only lands which did not then remain subject to the mortgage, as appeared to be the plain meaning of the proviso; that the Commissioner of the General Land Office took the position that there was no authority in the officers of the Land Department of the United States to issue regulations providing for the entry under any of the public land laws of lands which had been earned by the Railway Company, or to accept payment for the lands, or to allow entry thereof, and was sustained by the First Assistant Secretary of the Interior in *38 Land Decisions* 77; that the Supreme Court of the United States held that failure to open lands granted by the Resolution to preemption and settlement at the expiration of five years from the completion of the entire road in 1887, whether the lands were then subject to the mortgage, or not, was a breach of its contract with the United States, and that the Government was entitled, if it could, to prove any damage to it, or advantage to the Company, which resulted from this breach of contract (*U.S. v. N.P. Ry. Co.*, *311 U.S.* 317, 368), and that thereafter a compromise settlement was effected, with the approval of the court,

under which the Company relinquished its claim to additional lands, and compensation for lands, and consented to judgment against it and in favor of the Government for three hundred thousand dollars, and the Government relinquished its claims against the Company (*U.S. v. N.P. Ry. Co.*, 41 *F. Supp.* 273). Obviously, the failure to open the lands granted by the Resolution to preemption and settlement at two dollars and fifty cents per acre, could not entitle purchasers to relief when it was held to warrant a recovery of damages by the United States which were then paid.

So far as the comments of appellants are concerned with respect to Congressional intent, the legislative history of the Joint Resolution leaves no doubt that it was the intent of Congress to confine the settlement and preemption proviso to the additional lands between Portland and Puget Sound granted in aid of the construction of the Portland-Tacoma line. In the face of such clear evidence of congressional intent found in the legislative history of the Joint Resolution, there is certainly no point in endeavoring to ferret out a different intent from the language of the resolution itself. And, of course, the language of the act of 1929 does not purport to determine or influence decision as to the application of the settlement and preemption proviso.

CONCLUSION

We respectfully submit that from the language of the act of 1864, the legislative history of the Joint Resolu-

tion of 1870, the language of the Joint Resolution of 1870, and the many decisions referred to above, that the only lands granted by the Resolution of 1870, were the new and additional lands between Portland and Puget Sound. No lands in Montana were granted by the Joint Resolution of 1870. Title to all lands in Montana was acquired by appellee by reason of the grant of 1864.

When Congress inserted the restrictive language in the settlement and preemption proviso of 1870—that is, “all lands hereby granted shall be subject to settlement and preemption like other lands,”—Congress contemplated and intended only the new and additional land in Washington and Oregon granted by the Resolution to aid in the construction of the new Portland to Puget Sound line. That such was the intention of Congress is reflected by the decisions of the Supreme Court of the United States which have considered and construed directly what was meant by Congress when it used that restrictive language “land hereby granted.”

Finally, we respectfully submit that the same issue with respect to second indemnity land involved in this case was submitted by the Government to the Supreme Court of the United States in the Land Grant Case of 1940, and was rejected by the court in that case. We further respectfully submit that the same basic issue of whether the only lands granted by the Joint Resolution of 1870 were the lands in Oregon and Washington along the Portland-Puget Sound line was submitted to and de-

ecided by this Ninth Circuit Court in the Russell case. In accepting the argument of appellee that the Joint Resolution granted no lands in Montana, and that the only lands granted by the Resolution were the new and additional lands between Portland and Puget Sound, this Ninth Circuit Court has already decided a basic issue of this case against the appellants.

We respectfully submit that the judgment of the lower Court should be affirmed.

Respectfully submitted,
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United States Court of Appeals

For the Ninth Circuit

LEITH C. MORTON, *Appellant,*

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a corporation, *Appellee.*

ROBERT E. KUNTZ, *Appellant,*

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a corporation, *Appellee.*

JOHN W. MAHAN, *Appellant,*

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Reply Brief of Appellant

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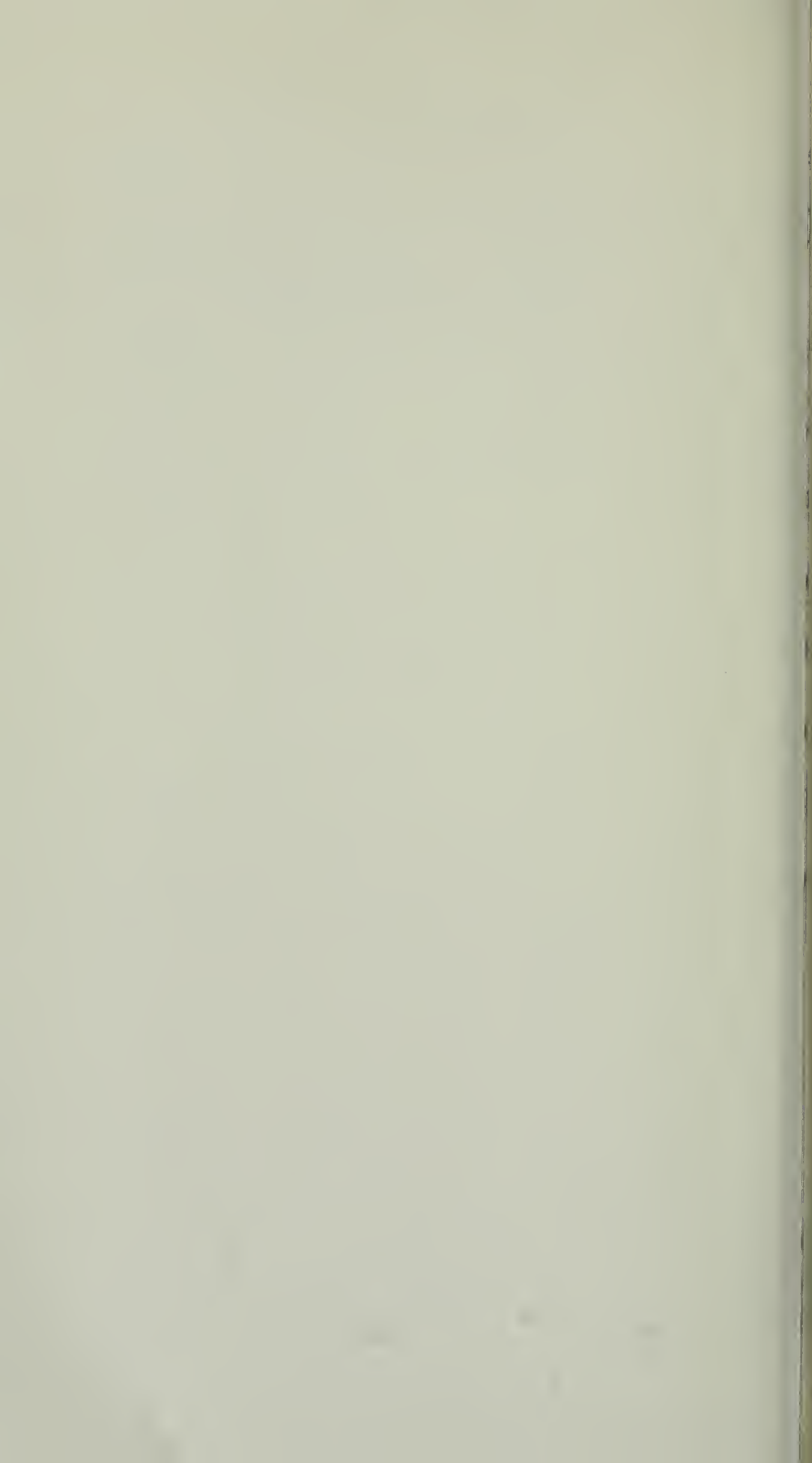
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Reply Brief of Appellant

INTRODUCTORY MATTERS

In this reply brief it is not our purpose to consider in detail each of the arguments presented in the brief of the Appellee Railway Company. Our purpose is to present as briefly as possible a demonstration of the basic flaw con-

tained in those arguments and the matter hereinafter presented is intended to relate to appellee's entire brief and argument.

Before proceeding, it should again be pointed out that these causes are in no way related to nor controlled by *Russell vs. Texas Company*, 238 Fed. (2d) 636, certiorari denied June 24, 1957, 77 Sup. Ct. 1400. That case was concerned solely with the applicability of the settlement and preemption proviso upon which the appellants rely to lands which were then the primary or place lands of the appellee Railway within the State of Montana originally provided for by the Act of July 2, 1864 (Chapter 217, 13 Statutes 365). There was no occasion in that case for any consideration of the applicability of the proviso to lands located within the second indemnity belt provided for by the Resolution of May 31, 1870 (Resolution 67, 1 Stat. 378) as divorced from the applicability of the proviso to the entire grant. The decision of this Court in that cause could not and did not dispose of the issues here presented. We are concerned here with lands which could not have been acquired by the Railway Company save and except for the passage of the aforementioned Joint Resolution. This being so, a decision to the effect that the settlement and preemption proviso of the Joint Resolution did not apply to the entire grant as contained in both the Resolution and the Act of 1864 has no bearing upon the issues here presented.

The arguments of the appellee Railway Company in its

rief are most succinctly summarized in those two paragraphs appearing on pages 3 and 4 of the appellee's brief reading as follows:

"We respectfully submit that the judgments should be affirmed for the reason that no lands, either place or indemnity, were granted in Montana to appellee by the later act of 1870, that the only lands which were granted to appellee by the Act of 1870 were additional lands between Portland and Puget Sound to subsidize construction of the new line. The source and origin of the title to all lands in Montana was the Act of 1864.

In addition, we respectfully submit that when, in the later Act of 1870, Congress restricted the settlement and preemption proviso to 'all lands hereby granted,' it intended or contemplated only the new lands granted between Portland and Puget Sound, and did not contemplate any land in Minnesota, North Dakota, Montana, Idaho, or Western Washington, all of which were acquired under and by virtue of the Act of 1864."

ARGUMENT

ANALYSIS OF THE GRANTING ACTS AND PREVIOUS DECISION RELIED UPON BY APPELLEE

In order to completely understand the previous decisions of the Supreme Court and the Department of the Interior upon which counsel for the appellee rely, it is necessary that the Act of 1864 and the Resolution of 1870 be analyzed rather carefully with reference to the difference between the lands within the place limits and the indem-

nity lands. The lands within the place limits have frequently been referred to as lands granted in praesenti, title to which vested in the Company as of the date of the Granting Act, whereas the lands within the indemnity limits were lands acquired by the Company by selection to replace lands lost within the primary or place grant, title to which could not be acquired by the Company until selection.

This analysis, while adequate for the purposes of the cases previously decided, is not entirely accurate. It would perhaps aid in understanding the problem involved to set out at this point a portion of Section 3 of the Act of 1866 reading as follows:

“And be it further enacted, That there be, and here by is, granted to the ‘Northern Pacific Railroad Company’, its successors and assigns, * * * every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, and said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof, the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from preemption, or other claims or rights, *at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or preempted, or otherwise disposed of, * * **

From the foregoing it can be seen that the statement of counsel for the appellee appearing at page 5 of appellee's brief to the effect that the lands in place limits were never subject to settlement or preemption except by appellee whereas indemnity lands on the other hand were at all times subject to settlement and preemption until selected is incorrect.

In *St. Paul & Pac. R. C. vs. N. P. R. Co.*, 11 Sup. Ct. 389, 39 U.S. 1, 35 L. Ed. 77, we find the following statement:

"The route not being at the time determined, the grant was in the nature of a float, and the title did not attach to any specific sections until they were capable of identification; but, when once identified, the title attached to them as of the date of the grant, except as to such sections as are specifically reserved. It is in this sense that the grant is termed one in praesenti;* * *."

Thus it can be seen that the problem preventing immediate passage of title upon passage of the act was a problem of identification. That problem likewise prevented immediate withdrawal of the place lands from settlement and preemption upon the passage of the Act. As to the place lands that problem ceased to exist at the time of definite location of the road. At that time the lands within the place limits were identified.

See also in this connection *Van Wyck vs. Knevals*, 106 U.S. 360, 16 Otto 360, 27 Law Ed. 201, quoted from at pages 16 and 17 of our original brief herein as follows:

"The grant is one in praesenti, except as its operation is affected by that condition; that is, it imports the transfer, subject to the limitations mentioned, of a present interest in the lands designated. The difficulty in immediately giving full operation to it, arises from the fact that the sections designated as granted are incapable of identification until the route of the road is 'definitely fixed.' When that route is thus established, the grant takes effect upon the sections by relation as of the date of the Act of Congress."

At page 20 of our original brief we pointed out that the lands within the indemnity belt as distinguished from the place lands were incapable of identification until such time as a deficiency became apparent in the place lands and the Company made a selection to replace the deficiency and we there cited and quoted from Atlantic & Pac. Railroad Co., Santa Fe Pac. Railroad Co., and Green Cattle Co., Inc., 58 Land Decisions 577, as follows:

"The right of the grantee in indemnity lands prior to selection has also been described as 'only a float which attaches to no specific lands until the selection is actually made (Ryan v. Railroad Company, 99 U.S. 382, 386; Cedar Rapids, etc., Railroad v. Herring, 110 U.S., 39), or as a right to no land capable of identification by any principles of law or rules of measurement. Kansas Pacific Railroad Company v. Atchison Topeka & Santa Fe Railroad Company, 112 U.S. 414 421.'" (Emphasis supplied).

Thus it can be seen that the problem with respect to both classes of land was a problem of identification solved

the case of the lands in place by definite location of the railroad and as to the indemnity lands by selection.

We pointed out in our original brief that the cases relied upon by the court below as demonstrating that the language "hereby granted" employed in the settlement and preemption proviso could only be applied to the place lands granted by the Resolution of 1870 were cases dealing with this problem of identification as created by the words "hereby granted" as used in Sections 3 and 6 of the Act of 1864 and with reference to controversies arising over the rights of the railroad in the lands in the indemnity belts prior to selection by the Railroad Company of those lands. In its brief the appellee again relies upon these cases. This is particularly true of *Hewitt vs. Schultz*, 21 Sup. Ct. 309, 45 L. Ed. 463, 180 U. S. 139, and of *Southern Pacific vs. Bell*, 22 Sup. Ct. 332, 183 U. S. 679, 46 L. Ed. 386 which cases are cited by counsel for the appellee under the heading "Decisions Reflecting That the Restrictive Language of the Resolution of 1870—'All Lands Hereby Granted'—Did Not Contemplate Land in Montana." The *Hewitt* case dealt with the controversy between *Hewitt* who had homesteaded lands within the indemnity belt prior to selection and *Schultz* who purchased from the Northern Pacific which asserted ownership by reason of the Act. The same situation in effect was involved in the *Southern Pacific* case and neither of these cases supports in

the least the proposition that the Congress was as precise in the choice of its language as the appellee would have us believe when it employed the same words "hereby granted" in the settlement and preemption proviso as had been employed in Sections 3 and 6 of the Act of 1864.

While we, counsel for the appellee and some of the previously decided cases have spoken of selection under the supervision of the Secretary of the Interior as necessary to passage of title to the Company insofar as the indemnity lands are concerned, in other words, to solution of this problem of identification, that position is not entirely correct. In *U. S. vs. N. P.* 41 Sup. Ct. 439, 256 U.S. 51, 65 L. Ed. 825, we find the following discussion which is of considerable assistance in understanding the problem:

"The provision relating to indemnity lands *was a much a part of the grant* and contract as the one relating to land in place (*Payne v. Central P. R. Co.* 255 U.S. 228, ante, 598, 41 Sup. Ct. Rep. 314), and it is apparent from the granting act and resolution that 'it was the purpose of Congress in making the grants to confer a substantial right to land within the indemnity limits in lieu of lands lost within the place limits.' *Weyerhaeuser v. Hoyt*, 219 U.S. 380, 387, 55 L. Ed. 258, 261, 31 Sup. Ct. Rep. 300 * * *.

When the grant was made by the act and resolution it was thought that the indemnity limits, as therein defined, contained lands largely in excess of what would be required to supply losses within the place limits.

and hence the provision in Sec. 6 under which, as construed by the land officers and this court, all lands in the indemnity limits were to be and remain subject to the operation of the Preemption and Homestead Laws, save as the odd-numbered sections should be taken out of their operation by indemnity selections. Under that provision, however, the lands available for indemnity were diminished much more rapidly than was expected; but as the provision was one of the terms of the grant, the company must submit to whatever of disadvantage results from it. This the company frankly recognizes, for in its brief it says: 'It was a part of our contract that, until selected, lands within the indemnity belt should be open to settlement under the Homestead and Preemption Laws;' and also: 'The question here is not whether, in the face of the deficiency, the settler (before selection) may acquire rights superior to ours, for we concede that he may.' But that provision gives no warrant for thinking that, after the company has earned the right to receive the lands comprehended in the grant, the government is free to reserve or appropriate to its own uses lands in the indemnity limits which are required to supply losses in the place limits. We say 'required' because we perceive no reason to doubt that lands in the indemnity limits may be so reserved or appropriated where what remains is sufficient to satisfy all the losses.

While it often has been said that, under such a grant, no right attaches to any specific land within the indemnity limits until it is selected, an examination of the cases will show that this general rule never has been applied as between the government and the grantee where the lands available for indemnity were not

sufficient for the purpose. Its only application has been where either the rights of settlers were involved, or the lands available for indemnity exceeded the losses, thereby making it essential that there be a selection *and identification* of the particular lands sought to be taken. This distinction is illustrated in *St. Paul & P. R. Co. v. Northern P. R. Co.* 139 U.S. 1, 35 L. Ed. 77, 11 Sup. Ct. Rep. 389. The question there presented was whether there was any need for a selection where no right of a settler was involved and the lands available for indemnity were not sufficient to supply the losses. By reason of this insufficiency it was ruled that the lands in the indemnity limits necessarily were appropriated to satisfy the losses, and that no selection was required. The court said, p. 19: 'As to the objection that no evidence was produced of any selection by the Secretary of Interior from the indemnity lands to make up for the deficiencies found in the lands within the place limits, it is sufficient to observe that all the lands within the indemnity limits only made up in part for these deficiencies. There was therefore, no occasion for the exercise of the judgment of the Secretary in selecting from them, *for they were all appropriated.*' * * *

One of the regulations of the Land Department requires that indemnity selections be accompanied by a specification—tract for tract—of the losses on account of which they are made. But that Department holds that this regulation does not apply where the losses exceed the lands which may be taken as indemnity. Thus, in *Re Hastings & D. R. Co.* 19 Land Dec. 30 it was said by Secretary Smith: 'The object in establishing the rule was to prevent the possibility of one basis of loss being used for more than one selection. As

this grant is known to be deficient over 800,000 acres . . . the danger of a duplication of the losses does not exist; and the reason of the rule ceasing, the rule itself does not operate.' And a similar ruling is found in *Chicago, R.I. & P. R. Co. v. Wagner* 25 Land Dec. 458, 460, and other cases.

Giving effect to all that bears on the subject, we are of opinion that after the company earned the right to receive what was intended by the grant, it was not admissible for the government to reserve or appropriate to its own uses lands in the indemnity limits required to supply losses in the place limits. Of course, if it could take part of the lands required for that purpose, it could take all, and thereby wholly defeat the provision for indemnity. But it cannot do either. The 'substantial right' conferred by that provision (*Weyerhaeuser v. Hoyt*, *supra*) cannot be thus cut down or extinguished (*Sinking Fund Cases*, *supra*).'' (Emphasis supplied).

The foregoing discussion re-inforces our position that the construction by the courts of the words "hereby granted" appearing in Sections 3 and 6 of the Act of 1864 arose by reason of this problem of identification which required different treatment in connection with withdrawal of the indemnity lands as opposed to the place lands. It likewise illustrates that when the problem of identification disappears the distinction between place lands and indemnity lands which arose by reason of that problem likewise disappears.

We have pointed out that this problem does not exist with respect to the construction of the language employed

in the preemption proviso of the Joint Resolution of 1870. The proviso did not go into effect until five years after the completion of the entire road. At that time there would be no problem of identification as the precise sections of the place lands granted by both the Act and the Resolution are determinable upon definite location of the railroad. At this time, of course, the sections of place land lost to the grant would become apparent and the railroad would immediately be entitled to select from the indemnity land hence it is clear that five years after the completion of the road the grant would be determined and the company's title to both the place and indemnity land fixed. It seems obvious to us that the problem with respect to the construction of Sections 3 and 6 of the Act of 1864 does not apply in connection with the construction of the proviso in the Joint Resolution.

We do not propose to discuss separately each of the decisions cited and relied upon by counsel for the appellee. Suffice to say that they are concerned either with the problem of withdrawal hereinbefore discussed or, as was true for instance of *N. P. vs. McRae*, 6 Land Dec. 400, and *U. S. vs. N. P. Railroad Co.*, 14 Sup. Ct. 598, 152 U. S. 284, 38 L. Ed. 443, with the problem of whether or not the company acquired a new land subsidy by the Resolution of 1870. It is important to note that these latter cases for the most part present no discussion whatsoever concerning the nature of the provision of the Joint Resolution by which the second indemnity belt was created and

that none of those cases are concerned with the settlement and preemption proviso. The only exceptions to this statement are *U. S. vs. N. P.*, 1940, 61 Sup. Ct. 264, 311 U. S. 37, 85 L. Ed. 210 and *Russell vs. N. P. R. Co.*, 238 Fed. (d) 636, Cert. Denied June 24, 1957, 77 Sup. Ct. 1400, which cases will be separately discussed hereinafter.

LEGISLATIVE HISTORY

Commencing at page 8 of appellee's brief there appears a discussion of the legislative history of the Joint Resolution of 1870. Counsel for the appellee point out in effect that this legislative history reflected the sentiment that it would be immoral and unfair and in the nature of a breach of contract to attempt to apply the proviso to any except the new lands granted by the resolution. There is no support, however, in the material presented in the appellee's brief for their contention that the proviso should apply only to the new line of road and the new land subsidy between Portland and Puget Sound.

The debates and remarks set forth by counsel for the appellee illustrate a degree of reluctance to apply a proviso such as the one under consideration to the lands which were granted to the railroad by the provisions of the Act of 1864 but it must be remembered that the particular lands here involved could not have been acquired under the Act of 1864. It was only by virtue of the Joint resolution of 1870 that the Railroad Company became entitled to the lands here involved. Consequently the application

of this proviso to these lands could not in any way be considered as an interference with the previous grant. Consider particularly the remarks of Senator Pomeroy set forth at page 10 of the Appellee's brief as follows:

" 'If the Senator from California (Mr. Casserly) had read carefully the amendment of the Senator from Massachusetts he would have seen that all that is embraced in the new grant is put at \$2.50 an acre * * * but I apprehend the Senator from California is too good a lawyer to suppose that he can make that application to a grant which already exists and that the company have had in their possession rightfully for several years. * * * It is a species of retrograde legislation going backward. It is in the nature of violating contract, which is only a little less than an immorality whenever proposed by any legislative body. While (?) Congress has power to do it, of course, I (do not?) doubt; but it certainly has not the right to do it * * * When that was not in the original act, it is too late to put it in now.' (Pages 2482-2483; we are uncertain of the accuracy of the language marked?")

The lands here involved were not included within any grant already in the possession of the company. The company could not have acquired the lands here involved under the Act of 1864. There would therefore be no obstacle either legal or moral to the application of the proviso to the lands here involved. At this point we should perhaps point out that the amendment proposed by Mr. Wilson, considered at page 9 of the appellee's brief, which was in the form of a limitation upon the company's right to sell rather than a command to sell, was defeated.

What we have said concerning the proceedings in the Senate is, of course, equally true as to the proceedings in the House of Representatives .

LAND GRANT CASE OF 1940

We do not propose to belabor the arguments heretofore presented with reference to the interpretation of the opinion in *U. S. vs. N. P. Ry. Co.*, 61 Sup. Ct. 264, 311 U. S. 317, 38 L. Ed. 210. Suffice to say that in that case the court did not hold that the proviso could not be applied to the lands within the second indemnity belt neither did it hold that the lands within the second indemnity belt were acquired by the railroad under the Grant of 1864. This holding, relied upon by counsel for the appellee, was as follows:

“We hold, contrary to the Government’s assertion, that the proviso of the Resolution of 1870, requiring the lands be opened by the company to settlement and preemption applies only to the additional lands granted by that Resolution *and not to the lands acquired under the grant of 1864*. We hold further that the company was not a trustee of the lands for the United States either in its own right or in behalf of possible settlers.. It results that the Government cannot call upon the company to account as a trustee for the proceeds of sale of the lands.* * *” (Emphasis supplied).

The discussion of this case presented by counsel for the appellee does not and cannot demonstrate that the court considered lands within the second indemnity belt as lands acquired under the Act of 1864. To pose the question is to

answer it for how could the lands within the second indemnity belt possibly be so considered? Without the Resolution of 1870 those lands could never have been acquired. There is no provision for them whatsoever in the Act of 1864 and as the appellee has repeatedly pointed out the Act of 1870 could not be considered an amendment to the Granting Act of 1864. See in particular the language in *N. P. Ry. Co. vs. DeLacy*, 19 Sup. Ct. 791, 174 U. S. 622, 14 L. Ed. 1111, quoted at page 25 of appellee's brief as follows:

"The defendant contends that the land in controversy was excluded by operation of law from the grant of 1864 by the resolution of May 31, 1870. Herein the defendant assumes that the effect of that resolution was to blot out the grant under the act of 1864. The resolution could not have that effect. It was not an amendment to the third section of the act of 1864 which granted the lands."

The language of the Supreme Court in the land grant case of 1940, quoted at pages 42 and 43 of appellee's brief, upon which the appellee relies so strongly, is not concerned in any respect with the nature of the second indemnity belt. The only concern was whether the company should be indemnified for lands lost to the Grant of 1870 by reason of the fact that they had previously been acquired under the Grant of 1864. The language there set forth can by no stretch of the imagination be considered support for the proposition that lands within the second indemnity belt were acquired under

Grant of 1864 which proposition is, we submit, an absurdity upon its face.

Insofar as *Russell vs. N. P. Ry. Co.*, 238 Fed. (2d) 636, is concerned we have previously pointed out that that case is concerned with place lands under the Grant of 1864 and not with indemnity lands under the grant of 1870. We have no reason to consider that case further.

POSITIVE DUTY TO CONVEY

Counsel for the appellee argue that the proviso is nothing more than a reservation by the United States of a power of disposition under the preemption and homestead laws and that only the United States could complain of a breach thereof. They point out that the Commissioner of the General Land Office took the position that there was no authority in the officers of the Land Department of the United States providing for the entry under any of the public land laws of lands which had been earned by the Railroad Company. Complete answer to the argument of the appellee is found in the case of *Oregon & C.R. Co. vs. U. S.*, 238 U.S. 393, 35 S. Ct. 908, 59 L. Ed. 1360, the very case cited by counsel for the appellee at page 49 of their brief. We have previously cited and quoted from that case but it is worthy of consideration again. We pointed out that in that case the proviso was a limitation upon the power of sale rather than a mandate to sell and the court in that case said further as to the nature of the proviso:

"By the acts of 1866 and 1870 it is provided that

upon the survey and location of the roads the government shall withdraw from sale the granted lands, and the provision would seem to withdraw the lands from the specific operation of the land laws, and certain from a complete analogy to them. The public land laws had test of the qualification of settlers under them; they had also the machinery of proof and precaution. When the granted lands were withdrawn from the laws and primarily devoted to another purpose they were committed to another power, to be administered for such purpose, and a discretion in the exercise of the power, within the restriction imposed, was necessarily conferred." 59 L. Ed. 1395.

In this case and under the grants here involved the situation is similar. Here too the land was withdrawn from the land laws and committed to another power for administration. However, the discretion vested in the Railroad Company in the grant involved in the Oregon & C. Co. case isn't present under the grant involved in this case. The proviso here required the Company to open the lands granted by the resolution to preemption and settlement rather than simply limiting their power to sell.

We have already seen that by granting acts the lands were removed from the operation of the land laws and committed to another power for administration. The land laws no longer supplied the method and machinery which the lands could be settled. How else then could the lands be open for settlement and preemption at \$2.50 per acre to be paid to the Railroad except by application to the Railroad to purchase thereunder?

With reference to the argument that U.S. vs. N.P. Ry. Co., supra, 61 Sup. Ct. 64, 311 U.S. 317, and the subsequent decision in the district court, 41 Fed Supp. 273, disposed of the issues here involved, counsel for the appellee ask how we could be entitled to relief when the failure to open the lands granted to preemption and settlement was decreed to warrant a recovery by the United States. In answer, we need only point out that there is nothing whatsoever in that final decision to indicate that the \$300,000 compromise was related in any way to the failure of the Company to open the land to settlement and preemption. The court provided in its decision:

"8. This decree shall be and remain a full and complete adjustment, accounting and settlement of all the rights and claims of the United States against the Northern Pacific Railroad Company, Northern Pacific Railway Company, and any and all persons claiming by, through, or under them, or either of them, and of all the rights and claims of said Northern Pacific Railroad Company, Northern Pacific Railway Company, and any and all persons claiming by, through, or under them, or either of them, against the United States, which have been presented or might have been presented herein under and by virtue of the Act of Congress of July 2, 1864, and Joint Resolution of May 31, 1870, and any and all acts amending or supplementing the same, *as provided by the Act of June 25, 1929.*" (Emphasis supplied) (41 F. Supp. 289-290).

We pointed out previously in our original brief the provision of the Act of Congress of 1929 referred to above by

the court in the above quotation which reads as follows:

“ * * * and the passage of this Chapter shall not be construed as in anywise evidencing the purpose or intention of Congress to depart from the policy of the United States expressed in the resolution of May 3, 1870, relative to the disposition of granted lands by said grantee, and the right is hereby reserved to the United States to, at any time, enact further legislation relating thereto.” 43 U.S.C.A. 923.

Based upon the foregoing and upon our original brief herein we submit that neither previous decisions nor legislative history supply any support for the position of the appellee and that sound logic demands that the appellant in this proceeding should finally be forced to honor the proviso of the Joint Resolution and that the appellant should prevail.

The history of the provisos such as the one here involved has been consistently a history of avoidance, evasion and almost contemptuous dismissal by the Railroad Companies. If the obvious intent of the Congress is ever to be honored, now and in this proceeding is the time and place.

Respectfully submitted,

RALPH J. ANDERSON,

STANLEY P. SORENSON,

Attorneys for Appellant.

Of Counsel J. R. VAUGHN.

No. 15521

United States
Court of Appeals
For the Ninth Circuit

ANTHONY SCRIVANICH,

Appellant,

vs.

UNITED STATES IMMIGRATION AND NAT-
URALIZATION SERVICE and JOHN P.
BOYD, District Director,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Western District of Washington,
Northern Division.

FILED

JUN 11 1957

PAUL P. O'BRIEN, CLERK

No. 15521

United States
Court of Appeals
For the Ninth Circuit

ANTHONY SCRIVANICH,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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1012 U. S. Court House,
Seattle 4, Washington.

In the United States District Court, Western
District of Washington, Northern Division

No. 4270

In the Matter of:

The Application of ANTHONY SCRIVANICH,

vs.

UNITED STATES IMMIGRATION AND NAT-
URALIZATION SERVICE and JOHN P.
BOYD, District Director.

PETITION FOR WRIT OF
HABEAS CORPUS

Comes now Anthony Scrivanich, the above-named
petitioner, and respectfully shows to this court as
follows:

I.

That he is a resident of Seattle, King County,
Washington, having resided in Seattle for nearly
five years last past. That he has heretofore been
ordered to be deported from the United States by
the United States Immigration and Naturalization
Service and that he is at liberty on his own recog-
nizance.

II.

That the petitioner is a citizen of Yugoslavia,
having been born in Sansego, now Yugoslavia, on
August 3, 1929. That his parents are not Italian
but are of Slavic origin and that both he and they
speak the Croatian language.

III.

That prior hereto a hearing was had in Seattle, Washington, pertaining to petitioner's residence in the United States. That although the place of the petitioner's birth was under Italian domination at the time of his said birth, said place is now territory belonging to Yugoslavia. That petitioner is a refugee from Yugoslavia who is unable to return thereto because of his fear of persecution, based on his opposition to the Communistic form of government. That petitioner based his right to remain in the United States on Congressional enactments authorizing certain refugees to remain in the United States. That the presiding inspector determined that the petitioner was of Italian nationality and was therefore subject to deportation to that country as being an unlawful immigrant therefrom.

IV.

That by reason of the action of the Immigration and Naturalization Service petitioner has been deprived of his right to qualify as a refugee from a country in which he might be persecuted because of his political and religious beliefs and is being forcefully compelled to enter a country which he does not recognize as his own.

V.

That after the order of deportation and prior hereto, a special bill was introduced in Congress which would authorize the legal admission of petitioner into the United States. Your petitioner has

been informed that said bill was passed by the Senate of the United States but that the same was not reported out of the House Judiciary Committee. That by reason of the foregoing, the Immigration and Naturalization Service has ordered petitioner to report at its headquarters in Seattle, Washington, at 1:00 o'clock p.m., on November 21 for immediate deportation to Italy.

VI.

That the decision of the Immigration and Naturalization Service is contrary to the Constitution and the laws of the United States of America and that petitioner's restraint and arrest are illegal.

Wherefore, petitioner prays this Honorable Court to issue an order to show cause directed to the respondents, directing them to show cause, if any they have, why a Writ of Habeas Corpus should not issue for the release of the petitioner from any further restraint and as to why the arrest of the petitioner for his deportation should not be declared void.

Petitioner further prays for a temporary restraining order directed against the respondents, restraining them from executing the order of deportation until further order of this court.

/s/ ANTHANY AGUSTINO
SCRIVANICH,
Petitioner.

Duly verified.

[Endorsed]: Filed November 21, 1956.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

This matter coming on regularly before the above-entitled court on a Petition for a Writ of Habeas Corpus, the petition of Anthony Scrivanich having been filed herein, alleging that the arrest of the petitioner by the respondents and an order of deportation issued for the petitioner's deportation to Italy, was and is illegal and void;

Now, Therefore, It Is Hereby Ordered that the respondents, United States Immigration and Naturalization Service, and John P. Boyd, District Director, be and they are hereby ordered to show cause in the above-entitled court on the 3rd day of December, 1956, at the hour of 10 o'clock, as to why the Petition for a Writ of Habeas Corpus should not be granted;

Done in Open Court this 21st day of November, 1956.

/s/ JOHN C. BOWEN,
U. S. District Judge.

Presented by:

/s/ A. M. URSICH,
Attorney for Petitioner.

[Endorsed]: Filed November 21, 1956.

[Title of District Court and Cause.]

RETURN TO PETITION FOR WRIT
OF HABEAS CORPUS

The respondent makes the following Return to the Petition for Writ of Habeas Corpus herein:

I.

That the petitioner is an alien, approximately 26 years of age, who last entered the United States at the Port of New York on October 23, 1951, as a seaman on the "SS Argentina," a vessel of Panamanian registry. At said time he was admitted under Section 3 (5) of the Act of May 26, 1924 (8 USCA 203 (5)). On November 21, 1952, the District Director, Immigration and Naturalization Service, issued a warrant for petitioner's arrest, alleging therein that he was, at the time of his entry, an immigrant not in possession of a valid immigration visa as required under the provisions of the Act of May 26, 1924, and not exempt therefrom and that he was therefore subject to deportation pursuant to law. Said warrant of arrest was served on petitioner at Seattle on November 21, 1952, the date of issuance.

II.

That a deportation hearing was accorded the petitioner on December 12, 1952, at Seattle, at which time he was represented by counsel. At said hearing the testimony of petitioner was taken in the

Slavic language through his interpreter. During the course of said hearing the petitioner admitted that he is an alien, that he had last entered the United States on October 23, 1951, as a member of the crew of the "SS Argentina," that he had deserted the ship at the Port of New York, that at the time of said entry into the United States he had intended to remain in the country permanently, and that at the time of said entry he was not in possession of a valid immigration visa for the purpose of entering the United States for permanent residence. Petitioner specified in said hearing that in said hearing that in the event he should be found subject to deportation and ordered deported that he be deported to Canada. He also requested the privilege of voluntary departure should he be found ineligible to remain in the United States.

III.

On December 16, 1952, the hearing officer ordered that the petitioner be deported under Sections 13 and 14 of the Act of May 26, 1924 (8 USCA 213, 214), pursuant to law on the charge stated in the warrant of arrest. Petitioner appealed from the decision of the hearing officer to the Board of Immigration Appeals, and on May 4, 1952, the Board ordered the said appeal dismissed upon consideration of the entire record. On May 26, 1953, the District Director issued a warrant for the deportation of the petitioner. A copy of the record of deportation proceedings is attached hereto in certified form, incorporated herein, and marked Exhibit A.

IV.

On June 10, 1953, Senator Jackson introduced a private bill in petitioner's behalf in the Senate of the United States providing for relief from deportation. Petitioner received a stay of deportation during the pendency of said legislation. The Bill did not receive favorable action in the Senate Judiciary Committee and was not reported out of said committee or become enacted into law.

V.

That on November 25, 1954, petitioner was flown to New York by the Immigration and Naturalization Service for deportation to Italy pursuant to the warrant of deportation issued May 26, 1953, by the respondent herein. While in New York awaiting deportation, petitioner filed a petition for writ of habeas corpus, which petition was subsequently abandoned; on January 4, 1955, petitioner filed an application for relief from deportation under Section 6 of the Refugee Relief Act of 1953; said application set forth petitioner's assertion of Yugoslav nationality and his fear of persecution by reason of racial, religious and political convictions.

VI.

That a hearing on petitioner's application for relief under the Refugee Relief Act of 1953 was accorded petitioner in New York on January 4, 1955, at which time petitioner was represented by counsel. On January 5, 1955, the special inquiry officer recommended that said application be denied for the reason that petitioner's last entry into the

United States was unlawful. Said recommendation was approved upon consideration of the entire record by the Acting Regional Commissioner of the Immigration and Naturalization Service on February 17, 1955. Copies of petitioner's application for relief under the Refugee Relief Act of 1953 and the record of administrative proceedings are attached hereto in certified form, marked as Exhibit B, and incorporated herein.

VII.

That on January 7, 1955, petitioner filed a motion before the Board of Immigration Appeals requesting reopening of the deportation proceedings and reconsideration of the order entered by the hearing officer on December 16, 1952. Said motion was denied on June 8, 1955.

VIII.

That thereafter a private bill was introduced in the Senate of the United States in behalf of the petitioner which provided for relief from deportation. Said Bill (S. 551) was passed by the Senate on January 16, 1956, but was not thereafter enacted into law. During the pendency of said proposed legislation, petitioner was granted a stay in deportation, and upon failure of the bill's enactment into law, petitioner was granted a further stay in deportation until November 1, 1956, to permit him to attempt to emigrate to Canada. Petitioner failed to depart from the United States by said date, and on November 2, 1956, he was ordered to report to

the District Office of the Immigration and Naturalization Service at Seattle on November 21, 1956, for deportation to Italy pursuant to the warrant of deportation issued May 26, 1953.

IX.

That the subject deportation proceedings and subsequent administrative proceedings upon petitioner's application for relief under the provisions of the Refugee Relief Act of 1953 were not arbitrary, unfair or unreasonable; that said proceedings have been reasonable, fair and lawful, and the order of deportation and the denial of relief upon petitioner's application under the Refugee Relief Act are supported by the record as a whole.

X.

Respondent denies all the allegations set forth in paragraph II of the petition; denies all the allegations set forth in paragraph III of the petition, but admits that petitioner was accorded a hearing in Seattle, Washington, pertaining to petitioner's residence in the United States; denies all the allegations set forth in paragraph IV of the petition; and denies all the allegations set forth in paragraph VI of the petition.

Wherefore, it is prayed that the petition for a writ of habeas corpus be dismissed and the rule to show cause discharged.

/s/ CHARLES P. MORIARTY,
United States Attorney;

/s/ RICHARD F. BROZ,
Assistant United States
Attorney.

/s/ JOHN P. BOYD,
District Director.

Duly verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed November 30, 1956.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Matter came on for hearing before the above-entitled Court on February 12, 1957, upon the application of petitioner, Anthony Scrivanich, for a writ of habeas corpus and order to show cause. Petitioner was represented by his attorneys, Anthony M. Ursich and Richard Jensen; respondent was represented by Richard F. Broz, Assistant United States Attorney. Respondent filed a return to the petition for writ of habeas corpus, to which return were attached the records of deportation proceedings relating to petitioner, marked Exhibits A and B. The records of deportation proceedings were admitted into evidence upon stipulation of the parties, with the exception of Respondent's Exhibit A-1, which was admitted into evidence over petitioner's objection; memorandums of authorities

were filed, and oral argument was had. The Court, being fully advised, pronounced its oral decision February 12, 1957. Whereupon, the Court makes the following Findings of Fact and Conclusions of Law.

Findings of Fact

I.

That the petitioner is an alien, approximately 26 years of age, who last entered the United States at the Port of New York on October 23, 1951, as a seaman on the "SS Argentina," a vessel of Panamanian registry. At said time he was admitted under Section 3 (5) of the Act of May 26, 1924 (8 USCA 203 (5)). On November 21, 1952, the District Director, Immigration and Naturalization Service, issued a warrant for petitioner's arrest, alleging therein that he was, at the time of his entry, an immigrant not in possession of a valid immigration visa as required under the provisions of the Act of May 26, 1924, and not exempt therefrom and that he was therefore subject to deportation pursuant to law. Said warrant of arrest was served on petitioner at Seattle on November 21, 1952, the date of issuance.

II.

That a deportation hearing was accorded the petitioner on December 12, 1952, at Seattle, at which time he was represented by counsel. At said hearing the testimony of petitioner was taken in the Slavic language through his interpreter. During the course of said hearing the petitioner admitted

that he is an alien, that he had last entered the United States on October 23, 1951, as a member of the crew of the "SS Argentina," that he had deserted the ship at the Port of New York, that at the time of said entry into the United States he had intended to remain in the country permanently, and that at the time of said entry he was not in possession of a valid immigration visa for the purpose of entering the United States for permanent residence. Petitioner specified in said hearing that in the event he should be found subject to deportation and ordered deported that he be deported to Canada. He also requested the privilege of voluntary departure should he be found ineligible to remain in the United States.

III.

On December 16, 1952, the hearing officer ordered that the petitioner be deported under Sections 13 and 14 of the Act of May 26, 1924 (8 USCA 213, 214), pursuant to law on the charge stated in the warrant of arrest. Petitioner appealed from the decision of the hearing officer to the Board of Immigration Appeals, and on May 4, 1952, the Board ordered the said appeal dismissed upon consideration of the entire record. On May 26, 1953, the District Director issued a warrant for the deportation of the petitioner.

IV.

On June 10, 1953, Senator Jackson introduced a private bill in petitioner's behalf in the Senate of the United States providing for relief from depor-

tation. Petitioner received a stay of deportation during the pendency of said legislation. The Bill did not receive favorable action in the Senate Judiciary Committee and was not reported out of said committee or become enacted into law.

V.

That on November 25, 1954, petitioner was flown to New York by the Immigration and Naturalization Service for deportation to Italy pursuant to the warrant of deportation issued May 26, 1953, by the respondent herein. While in New York awaiting deportation, petitioner filed a petition for writ of habeas corpus, which petition was subsequently abandoned; on January 4, 1955, petitioner filed an application for relief from deportation under Section 6 of the Refugee Relief Act of 1953; said application set forth petitioner's assertion of Yugoslav nationality and his fear of persecution by reason of racial, religious and political convictions.

VI.

That a hearing on petitioner's application for relief under the Refugee Relief Act of 1953 was accorded petitioner in New York on January 4, 1955, at which time petitioner was represented by counsel. On January 5, 1955, the special inquiry officer recommended that said application be denied for the reason that petitioner's last entry into the United States was unlawful. Said recommendation was approved upon consideration of the entire rec-

ord by the Acting Regional Commissioner of the Immigration and Naturalization Service on February 17, 1955.

VII.

That on January 7, 1955, petitioner filed a motion before the Board of Immigration Appeals requesting reopening of the deportation proceedings and reconsideration of the order entered by the hearing officer on December 16, 1952. Said motion was denied on June 8, 1955. Records of the Immigration and Naturalization Service, admitted into evidence as Respondent's Exhibit A-1, indicate that during the interim, respondent directed an inquiry through government channels to Canadian authorities as to whether Canadian officials would issue travel documents to petitioner to effectuate his deportation to Canada, and that on May 4, 1955, the Chief of the Admissions Division, Department of Citizenship and Immigration, Canada, directed a letter communication to United States officials stating in effect that petitioner was not admissible to Canada as a deportee from the United States.

VIII.

That thereafter a private bill was introduced in the Senate of the United States in behalf of the petitioner which provided for relief from deportation. Said Bill (S. 551) was passed by the Senate on January 16, 1956, but was not thereafter enacted into law. During the pendency of said proposed legislation, petitioner was granted a stay in depor-

tation, and upon failure of the bill's enactment into law, petitioner was granted a further stay in deportation until November 1, 1956, to permit him to attempt to emigrate to Canada. Petitioner failed to depart from the United States by said date, and on November 2, 1956, he was ordered to report to the District Office of the Immigration and Naturalization Service at Seattle on November 21, 1956, for deportation to Italy pursuant to the warrant of deportation issued May 26, 1953.

From the foregoing Findings of Fact the Court makes the following:

Conclusions of Law

I.

That the subject deportation proceedings were not arbitrary, unfair or unreasonable, and petitioner has been accorded a full and fair hearing upon the issue of his deportability.

II.

That the petitioner has been accorded a full and fair hearing upon his application for relief from deportation under the provisions of Section 6 of the Refugee Relief Act of 1953, and the denial of such application was not arbitrary, unfair, or an abuse of discretion.

III.

That the warrant of deportation under date of May 26, 1953, is valid and subsisting, and the order

of deportation herein is supported by the record as a whole.

IV.

That respondent is entitled to an order dismissing the petition and discharging the order to show cause.

Done in Open Court this 11th day of March, 1957.

/s/ WILLIAM J. LINDBERG,
United States District Judge.

Approved as to form and entry:

/s/ RICHARD JENSEN,
Of Attorneys for Petitioner.

Presented and approved by:

/s/ RICHARD F. BROZ,
Assistant United States
Attorney.

[Endorsed]: Filed March 11, 1957.

United States District Court, Western District of
Washington, Northern Division

No. 4270

In the Matter of:

The Application of ANTHONY SCRIVANICH

vs.

UNITED STATES IMMIGRATION AND NAT-
URALIZATION SERVICE and JOHN P.
BOYD, District Director.

ORDER

This Matter having been heard by the Court on February 12, 1957, the petitioner being represented by counsel, Anthony M. Ursich and Richard Jensen, and the respondent being represented by Richard F. Broz, Assistant United States Attorney, the record of administrative proceedings and oral argument having been considered, and the Court having heretofore entered its oral opinion and stated its Findings of Fact and Conclusions of Law, now, therefore,

It Is Ordered, Adjudged and Decreed that the petition in this cause be and the same is hereby denied, and the order to show cause heretofore issued is discharged.

Done in Open Court this 11th day of March, 1957.

/s/ WILLIAM J. LINDBERG,
United States District Judge.

Approved as to form and entry:

/s/ RICHARD JENSEN,
Of Attorneys for Petitioner.

Presented and approved by:

/s/ RICHARD F. BROZ,
Assistant United States
Attorney.

[Endorsed]: Filed and entered March 11, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: The Clerk of the above-entitled court, United States Immigration and Naturalization Service, John P. Boyd, District Director, and to Charles P. Moriarty and Richard F. Broz, Attorneys for the Respondents.

You and Each of You are hereby notified that the petitioner above named, Anthony Scrivanich, feeling aggrieved at the order of the court entered on or about the 11th day of March, 1957, wherein the above-entitled court ordered, adjudged and decreed that the petition in this cause be denied and that the Order to Show Cause heretofore issued is discharged, is appealing therefrom to the United States Circuit Court of Appeals for the Ninth Circuit and does hereby appeal from each and every part of said order, judgment and decree of the Dis-

trict Court and from all rulings and orders adverse to this petitioner which occurred during the trial of said cause and prior and subsequent thereto.

Dated this 11th day of March, 1957.

/s/ RICHARD JENSEN,
Attorney for Petitioner.

[Endorsed]: Filed March 11, 1957.

RESPONDENT'S EXHIBIT A-1

United States of America
Department of Justice
Immigration and Naturalization Service
Seattle, Washington

January 16, 1957.

Certification

By Virtue of the authority vested in me by Title 8, Code of Federal Regulations, Section 2.1, a regulation issued by the Attorney General pursuant to Section 103 of the Immigration and Nationality Act,

I Hereby Certify that the annexed documents are originals, or copies thereof, from the records of the said Immigration and Naturalization Service, Department of Justice, relating to Anthony A. Scrivanich, File No. A8 897 365, of which the Attorney

General is the legal custodian by virtue of Section 103 of the Immigration and Nationality Act.

In Witness Whereof I have hereunto set my hand and caused the seal of the Department of Justice, Immigration and Naturalization Service, to be affixed, on the day and year first above written.

[Seal] /s/ JOHN P. BOYD,
District Director, Immigration and Naturalization
Service.

The Foreign Service of the
United States of America
Ottawa, Ontario

5000/9.

May 3, 1955.

P. T. Baldwin, Chief,
Admissions Division,
Dept. of Citizenship & Immigration,
Immigration Branch,
Ottawa, Ontario.

Attention: Mr. F. A. Smith.

Dear Sir:

Reference is made to the conversation had recently between an official of your Department and the writer concerning the case of the person named below, who is under deportation proceedings in the United States and has specified Canada as the country to which he desires to be deported. The facts in the case are as follows:

Name: Anthony Agustino Scrivanich.

Age: Born August 3, 1929.

Place of birth: Sansego, Istria, Yugoslavia
(formerly Italy).

Present nationality: Italy.

Occupation: Seaman.

Residence in the U. S.: Since Oct., 1951.

Grounds for deportation: Documentary.

Prior residence in Canada: None.

Relatives/friends in Canada: None.

It will be very much appreciated if you will confirm the oral decision made in this case by signing in the appropriate space below and return this letter as soon as possible.

Very truly yours,

/s/ ARTHUR H. MacGREGOR,
Attache.

Arthur H. MacGregor, Attache,
U. S. Embassy, Ottawa, Ontario.

Date: May 4, 1955.

The case of Anthony Agustino Scrivanich has been considered and it has been determined that he is not admissible as a deportee from the United States.

/s/ P. T. BALDWIN,
Chief, Admissions Division.

A8 897 365.

April 28, 1955.

A. H. MacGregor, Liaison Officer,
United States Embassy, Ottawa, Ontario, Canada.
Walter R. Stolz, Acting Chief, Detention, Deportation and Parole Section, Seattle, Washington.
Anthony Agustino Scrivanich.

Transmitted please find Form I-217 in the case of the subject alien. You will note that although the subject has never resided in Canada and has no family or friends there, he has requested deportation to Canada.

Please present this case to the Canadian authorities with a view to obtaining a travel document for his deportation to Canada.

Attachment:

WRS:mbl

2 6/1/55

File

mbl

Admitted February 12, 1957.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK, U. S. DISTRICT
COURT, TO RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 10 of the United States Court of Appeals for the Ninth Circuit and Rule 75(o), FRCP, I am transmitting herewith the following original documents in the file dealing with the cause as the record on appeal herein to the United States Court of Appeals for the Ninth Circuit at San Francisco, said papers being identified as follows:

1. Petition for Writ of Habeas Corpus, filed Nov. 21, 1956.
2. Order to Show Cause, filed Nov. 21, 1956.
3. Return to Petition for Writ of Habeas Corpus, filed Nov. 30, 1956, with Exhibits "A" and "B" attached (which exhibits were marked as trial Exhibits A-2 and A-3, respectively).
4. Brief of Petition in Support of Petition for Writ of Habeas Corpus, filed Dec. 17, 1956.
5. Respondent's Brief, filed Dec. 27, 1956.
6. Respondent's Suppl. Memo, filed Jan. 17, 1957.

In the United States Court of Appeals
for the Ninth Circuit

No. 15521

ANTHONY SCRIVANICH,

Appellant,

vs.

UNITED STATES IMMIGRATION AND NAT-
URALIZATION SERVICE and JOHN P.
BOYD, District Director,

Appellee.

STATEMENT OF POINTS AND
DESIGNATION OF RECORD

Comes now the appellant, through his attorneys of record, and respectfully submits the following statement of points and designation of record upon which he will rely in his appeal in the above-entitled cause.

Statement of Points

I.

The denial of petitioner's motion of January 7, 1955, requesting reopening of the deportation proceedings was arbitrary, unreasonable and unfair.

II.

The petitioner was unlawfully deprived of his right to qualify as a refugee under the Refugee Relief Act of 1953, by virtue of the erroneous finding that he entered into the United States unlawfully.

III.

The order of deportation to Italy is unlawful.

IV.

Exhibit A-1 was admitted into evidence erroneously over objection.

Respectfully submitted,

/s/ ANTHONY M. URSICH,

/s/ RICHARD J. JENSEN,
Attorneys for Appellant.

Service of copy acknowledged.

[Endorsed]: Filed April 29, 1957.

THE
JOURNAL OF THE
ROYAL ANTHROPOLOGICAL INSTITUTE

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In The United States
Circuit Court of Appeals
For the Ninth Circuit

ANTHONY SCRIVANICH,

Appellant,

vs.

UNITED STATES IMMIGRATION AND
NATURALIZATION SERVICE and JOHN
P. BOYD, District Director,

Appellee

Brief of Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

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In The United States
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In The United States
Circuit Court of Appeals
For the Ninth Circuit

ANTHONY SCRIVANICH,

Appellant,

vs.

UNITED STATES IMMIGRATION AND
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P. BOYD, District Director,

Appellee

Brief of Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

STATEMENT CONCERNING JURISDICTION

Petitioner, an alien, was ordered deported from the United States. He petitioned the District Court for a Writ of Habeas Corpus (Tr. 3). The petition was denied (Tr. 19). The jurisdiction of the United States District Court is sustained by provisions of Title 28, Section 41, of the United States Code Annotated, and the jurisdiction of this Court by the provisions of Title 28, Section 1291, United States Code Annotated, and the rules promulgated by the Supreme Court of the United States pursuant thereto.

STATEMENT OF THE CASE

Petitioner Anthony Scrivanich was born in Sansego, now Yugoslavia, on August 3, 1929, and is of Slavic origin. Sansego was under Italian domination at this time, but after World War II became Yugoslavian territory. Petitioner fearing persecution and being opposed to the Communistic form of government fled his home. Subsequently, as a seaman he entered the United States on a number of occasions. His last entry was on October 23, 1951, as a seaman. Being unable to return to his native land because of his fear of persecution he remained in the United States seeking asylum.

Petitioner is now a resident of Seattle, King County, Washington, and has resided in Seattle for nearly five years. His last entry into the United States was on October 23, 1951, as a seaman when he was admitted under Section 3 (5) of the Act of May, 1924. (8 U. S. C. A. 203 (5)).

A warrant of arrest was served on petitioner on November 21, 1952, and after a hearing, an order of deportation was issued on December 16, 1952, under Sections 13 and 14 of the Act of May, 1924 (8 U. S. C. A. 213, 214), on the ground that at the time of entry he was an immigrant not in possession of a valid immigration visa as required by the Act of May 26, 1924, and was therefore subject to deportation. Petitioner appealed the decision of the hearing officer to the Board of Immigration Appeals and on May 4, 1953, the appeal was dismissed. On May 26, 1953, the District Director issued a warrant for deportation of the petitioner.

On January 4, 1955, petitioner filed an application for relief from deportation under Section 6 of the Refugee Relief Act of 1953. On January 5, 1955, the special inquiry officer recommended that the application be denied for the reason that the last entry into the United States was unlawful. The recommendation was approved by the acting regional commissioner of the Immigration and Naturalization Service on February 17, 1955.

QUESTIONS INVOLVED

I.

Can an alien be deported to a country other than from whence he came?

The Trial Court answered "yes."

II.

When an alien seaman is admitted to the United States under the terms of Section 3 (5) of the Act of May, 1924, (8 U. S. C. A. 203 (5)), does such entry become illegal by reason of the fact that the alien overstays his leave?

The Trial Court answered "yes."

ASSIGNMENTS OF ERROR

I.

The court erred in sustaining the order directing petitioner to be deported to a country other than from whence he came.

II.

The court erred in sustaining the finding of the special inquiry officer that petitioner entered the United States illegally.

ARGUMENT

ASSIGNMENT OF ERROR NO. 1

The court erred in sustaining the Department's ruling to the effect that the petitioner could be deported to Italy.

The order of deportation to Italy is illegal. Section 20 (8 U. S. C. A. 156) provided that deportation should be to the country from whence the alien came or to the foreign port from which he embarked for the United States. The term "country" means the state which at the time of deportation includes the place from whence the alien came. *Mensevich v. Todd*, 264 U.S. 134.

Under this section of the code the petitioner could not be deported to Italy because Italy is not the state which includes the place from whence the petitioner came. The petitioner came from Sansego, which is Yugoslavian territory, although at the time of petitioner's birth it was under Italian domination. Deportation to Italy pursuant to a hearing and deportation order under the Act of 1924 is therefore illegal.

ASSIGNMENT OF ERROR NO. 2

The court erred in sustaining the Department's position that the petitioner's entry into the United States was illegal.

Petitioner was unlawfully deprived of his right to qualify as a refugee under the Refugee Relief Act of 1953.

The respondents return to the Petition for Writ of Habeas Corpus admits that petitioner was admitted under Section 3 (5) of the Act of May, 1924, (8 U. S. C. A. 203 (5)), and that this was his last entry into the United States. Such entry is a legal entry although the alien is subject to deportation if he remains longer than permitted by the terms of his admission or fails to maintain the status under which he was admitted. *United States ex rel. Cateches v. Day*, 45 F. (2) 142. The determination by the acting regional commissioner of the Immigration and Naturalization Service on February 17, 1955, to deny petitioner's application for relief under Section 6 of the Refugee Relief Act of 1953 on the ground of illegal entry was therefore erroneous and unlawfully deprived the petitioner of his right to qualify as a refugee from communist Yugoslavia.

CONCLUSION

We respectfully submit to this Honorable Court that in the light of the foregoing cases and code sections, the deportation proceedings and administrative proceedings upon the application for relief under the Refugee Relief Act of 1953 were unlawful.

Respectfully submitted,

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No. 15,524

United States Court of Appeals
For the Ninth Circuit

JAMES REESE,

Appellant,

vs.

HARLEY O. TEETS, Warden, California
State Prison, San Quentin, California,

Appellee.

APPELLEE'S BRIEF.

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No. 15,524

**United States Court of Appeals
For the Ninth Circuit**

JAMES REESE,

Appellant,

VS.

HARLEY O. TEETS, Warden, California
State Prison, San Quentin, California,

Appellee.

APPELLEE'S BRIEF.

STATEMENT OF THE CASE.

On February 13, 1957, appellant filed a petition for writ of habeas corpus in the District Court. On February 14, 1957, the District Court denied the petition for writ of habeas corpus and denied a stay of execution. The District Court likewise denied a certificate of probable cause. The Chief Judge of this Court granted a certificate of probable cause on February 15, 1957 and ordered the execution scheduled for that date "stayed for thirty days and the prisoner's right to seek a further stay from the Supreme Court or a justice thereof is recognized."

STATEMENT OF THE FACTS.

Petitioner was convicted in the Superior Court of the City and County of San Francisco on seven counts; two counts of murder, one account of assault with intent to commit murder, three counts of burglary and one count of rape. The Superior Court imposed the death penalty on each of the two murder counts.

Automatic appeal was decided by the California Supreme Court on October 5, 1956 in an opinion reported as *People v. Reese*, 47 A.C. 107. On December 18, 1956, appellant filed a petition for writ of habeas corpus in the California Supreme Court. This petition contained the same allegations as the petition filed in the District Court. The California Supreme Court denied that petition on January 4, 1957.

Thereafter, and on March 11, 1957, the United States Supreme Court denied a stay of execution and a writ of certiorari, which sought review of both the affirmance of the judgments of the California Supreme Court and the denial of the writ of habeas corpus. See *Reese v. California*, 77 S.Ct. 597.

The petition filed in the District Court alleged three causes for relief: (1) That the court and the public defender, representing petitioner, conspired to deprive petitioner of a valid objection to evidence introduced in the trial; that the legality of the search and seizure of the petitioner's apartment was not raised and considered, due to the conspiracy of the public defender and the court; (2) that a certain defense witness was

not permitted to testify at petitioner's trial; and (3) that evidence of offenses of which he was not charged was introduced.

APPELLANT'S CONTENTIONS.

1. The introduction of evidence obtained by illegal search and seizure is a violation of the 14th Amendment.
 2. The introduction of evidence of other offenses in this case was a violation of the usual rule, and a violation of due process of law.
 3. The judge's instructions to the jury to the effect that if the jury should fix the penalty of death it should not specify the death penalty in the verdict, but simply return a verdict of guilty of murder in the first degree, was a violation of due process.
-

SUMMARY OF APPELLEE'S ARGUMENT.

- I. The introduction of evidence obtained by an illegal search and seizure does not involve any constitutional problem.
- II. The introduction of evidence of other offenses and the instruction to the jury as to the wording of the verdict, are purely questions of State law and involve no Federal questions.
- III. The petition below contained no allegation of exhaustion of State remedies and therefore was insufficient under 28 U.S.C. § 2254.

IV. The allegations concerning conspiracy by the defense counsel and the court are insufficient, since such conclusory allegations in the State court are not in compliance with State procedural requirements; there has been no exhaustion of State remedies within the meaning of 28 U.S.C. § 2254.

ARGUMENT.

I.

THE INTRODUCTION OF EVIDENCE OBTAINED BY AN ILLEGAL SEARCH AND SEIZURE DOES NOT INVOLVE ANY CONSTITUTIONAL PROBLEM.

The introduction of evidence obtained by an illegal search and seizure does not involve any constitutional problem. *Wolf v. Colorado*, 338 U.S. 25; *Irvine v. California*, 347 U.S. 128.

II.

THE INTRODUCTION OF EVIDENCE OF OTHER OFFENSES AND THE INSTRUCTION TO THE JURY AS TO THE WORDING OF THE VERDICT, ARE PURELY QUESTIONS OF STATE LAW AND INVOLVE NO FEDERAL QUESTIONS.

The introduction of evidence of other offenses and the instruction to the jury as to the wording of the verdict, are purely questions of State law and involve no Federal questions. The question of the introduction of evidence of other offenses is a question of relevancy to be determined by the State courts. Further-

more, this question, to the extent it was not raised in the automatic appeal, has been waived. *In re Dixon*, 1 Cal. 2d 756.

Likewise, the question concerning the wording of the instructions to the jury regarding the effect of a first degree murder verdict without recommendation, is purely a question of State law. Furthermore, this question was not raised on the appeal in the California Supreme Court and has been waived. *In re Dixon*, 1 Cal. 2d 756.

III.

THE PETITION BELOW CONTAINED NO ALLEGATION OF EXHAUSTION OF STATE REMEDIES AND THEREFORE WAS INSUFFICIENT UNDER 28 U.S.C. § 2254.

The petition for habeas corpus filed in the District Court contained no allegation as to the exhaustion of State remedies nor did it allege facts which would constitute exceptional circumstances. The petition does not reveal that a petition for habeas corpus was filed in the California Supreme Court, or did it allege that a writ of certiorari had been sought in the U. S. Supreme Court from the affirmance of the judgment by the California Supreme Court, or from the denial of the writ of habeas corpus by the California Supreme Court. Thus, the District Court could properly have denied the petition on this ground. See 28 U.S.C. § 2254; *Darr v. Burford*, 339 U.S. 200; *Darcy v. Heinze*, 194 F.2d 664 (9th Cir. 1952); also see *Gordon v. Scudder*, 163 F.2d 518 (9th Cir. 1947).

IV.

THE ALLEGATIONS CONCERNING CONSPIRACY BY THE DEFENSE COUNSEL AND THE COURT ARE INSUFFICIENT, SINCE SUCH CONCLUSORY ALLEGATIONS IN THE STATE COURT ARE NOT IN COMPLIANCE WITH STATE PROCEDURAL REQUIREMENTS; THERE HAS BEEN NO EXHAUSTION OF STATE REMEDIES WITHIN THE MEANING OF 28 U.S.C. § 2254.

In the brief filed in this appeal, appellant raises no question of due process based on the conspiracy between the public defender and the court, as alleged in the petition filed in the District Court. Petitioner has, therefore, legally abandoned this contention and no response is required of the appellee on this question. However, out of an abundance of caution, appellee wishes to point out the legal insufficiency of the allegation concerning the conspiracy between defense counsel and the court.

Appellant's allegation concerning the conspiracy between defense counsel and the trial court is based on the theory that evidence was illegally obtained by the police, and that as a result of the conspiracy no objection was made to the introduction of this evidence in the State court. In the first place, such evidence was legally obtained as is indicated by the testimony in the State court, and no objection to the evidence could be properly sustained. See *People v. Roberts*, 47 A.C. 379.

The petition alleges in conclusory form as follows: "defendant argue[s] further that during his trial and on the automatic appeal; due to the conspiracy of the court and the public defender; they kept the question

f 'search and seizure' from coming up in his trial; and also the public defender refused to argue on the issue in defendant's automatic appeal."

It is the contention of the appellee that this allegation is insufficient to raise a due process question, since this allegation is almost identical to the allegation made in the State court, and such an allegation does not comply with the State procedural requirements. Such a failure to comply with State procedural requirements is a failure to exhaust State remedies within the meaning of 28 U.S.C. § 2254.

It is the position of appellee that appellant has not exhausted his State remedies because the petition filed by him in the State Court did not comply with the California procedural requirements. Appellant has not complied with the California procedural rules requiring that the petitioner for a writ of habeas corpus allege with particularity the facts upon which he relies to overturn the judgment; he has thus not properly sought to invoke the corrective process of the State of California. A petitioner cannot exhaust his State remedies by the simple expedient of wilfully or negligently failing to present a proper petition in the State court.

Petitioner's allegation, as set out above, was simply that the defense counsel and the court conspired to deprive him of a legal objection to certain testimony.

The California Supreme Court has set forth procedural rules requiring specific allegations of fact to establish a cause for relief. This rule does not require

any technical preciseness; it simply requires a frank disclosure of the facts. This rule requires one who seeks to show his conviction was obtained by a conspiracy to deprive the petitioner of a legal objection in the trial court, to specify the precise testimony which was illegally obtained. This rule requires petitioner to state in detail what the actual facts are, and name or otherwise identify the persons involved in the conspiracy, and state also the circumstances establishing such person's knowledge of the fact. Likewise, this rule requires a showing of the materiality of the matter subject to the legal objection. Also, it requires a petitioner to state the facts which establish that the petitioner did not have the opportunity to present the matters at the trial or on appeal, or at an early date. Stating this another way, the rule requires an explanation of the delay in raising the matter. See *In re Swain*, 34 Cal. 2d 300; *In re Razutis*, 35 Cal. 2d 532; *People v. Bronaugh*, 100 Cal.App. 2d 220, at 224.

The petition filed by petitioner in the California Supreme Court did not comply with these rules.

There are no allegations in the petition filed in the State court that showed the materiality of the matter subject to objection, the names of the persons involved in the conspiracy, the identity of the persons involved in the conspiracy, or in any detail what the actual facts were. Likewise, there is no allegation that petitioner did not know the facts concerning this conspiracy at the trial, and that thus he did not have an opportunity to present the truth at the trial. Likewise,

here is no explanation of the delay of a period of months before raising this matter.

The orderly, equal, and just administration of criminal law requires that petitioners be required to raise all objections at the earliest possible moment. He should not be permitted to reserve a case for later use.

The California Supreme Court, in the case of *In re Swain*, 34 Cal. 2d 300, at 303-304, sums up the rule and the justification for the rule as follows:

“ . . . (O)ur determination that the vague, conclusionary allegations in the present petition are insufficient to warrant issuance of the writ is not a ruling on the merits of the issues which petitioner has attempted to raise (citations omitted). We are entitled to and we do require of a convicted defendant that he allege with particularity the facts upon which he would have a final judgment overturned and that he fully disclose his reasons for delaying in the presentation of those facts. This procedural requirement does not place upon an indigent prisoner who seeks to raise questions of the denial of fundamental rights in propria persona any burden of complying with technicalities; it simply demands of him a measure of frankness in disclosing his factual situation.”

Until appellee has submitted a petition that conforms to the State procedural requirements, he has not exhausted his State remedies. No exceptional circumstances are alleged to obviate the necessity for exhaustion of State remedies. The petition was, therefore, properly dismissed.

Indeed, it is well settled that there can be no exhaustion of State remedies until there has been submitted a petition that conforms to State procedural requirements.

Buchanan v. O'Brien, 181 F.2d 601 (1st Cir., 1950);

Willis v. Utecht, 185 F.2d 810 (8th Cir., 1950);

United States ex rel. Calvin v. Cloudy, 95 F. Supp. 732 (D.C. N., 1951).

Dated, San Francisco, California,
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United States Court of Appeals For the Ninth Circuit

ALAN W. BOUDREAU,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

JURISDICTION.

Appellant's brief provides no basis upon which this Court has jurisdiction to review the District Court's order of dismissal for lack of prosecution. Such a statement is required by this Court's Rule 18(2)(b), which reads in pertinent part as follows:

"2. This (appellant's) brief shall contain, in order here stated—

"(b) A statement of the pleadings and facts disclosing the basis upon which it is contended . . . that this Court has jurisdiction to review the judgment, decree or order in question."

Lacking such statement, the appeal may be dismissed (Rule 18(7)).

The United States contends it is under no duty to supply jurisdictional statements for appellant. This appeal

should be dismissed for appellant's failure to state the basis of the Court's appellate jurisdiction.

STATEMENT OF THE CASE.

This purports to be an appeal from the District Court's order of dismissal (and its order denying reconsideration of the same) of a seaman's libel for alleged personal injury. After a number of hearings the libel was dismissed for lack of prosecution.

Appellant's purported statement of the case (appearing in his brief under the title "Chronological History of the Case") is essentially correct, so far as it goes. However the brevity of that statement does not give a true picture of the background of this litigation. It does not fairly recite the state of the record upon which the District Court's dismissal for lack of prosecution was based. Therefore, it is only proper that the entire chronicle of this matter be called to the Court's attention.

Appellee believes that the pertinent chronological procedural history of the cause is exactly as the Government set it out in its "Memorandum of Points and Authorities in Support of Motion to Dismiss For Lack of Prosecution" (Tr.* 26). The docket entries (Tr. 66) speak eloquently for themselves and constitute the true and complete "statement of the case" in this cause.

*Transcript of Record.

The pertinent dates and docket entries are these:

years and months	{	2 years and 9 months	Date of injury	November 5, 1952
			Libel filed	May 5, 1954
			Dismissal calendar	December 30, 1954
			Answer filed	July 26, 1955
			Dismissal calendar	August 31, 1956
			Motion to dismiss for lack of prosecution	February 11, 1957
			Dismissal calendar	March 4, 1957
			Libel dismissed for lack of prosecution	March 11, 1957
			Libelant's motion for reconsideration of order of dismissal	March 25, 1957
			Motion for reconsider- ation of dismissal denied	March 26, 1957

Time elapsing between the date of alleged accident and entry of the Court's final ruling on the dismissal was in excess of four years and four months. Time elapsing between the filing of the libel and entry of the Court's final ruling was approximately two years and nine months. The only positive, forward-going action during that time was that of the Government in answering the libel. The time elapsing between the date the Government filed its answer and the Court's order of dismissal for lack of prosecution was one year, eight months. The cause was actually called on *three* of the Court's regular dismissal calendars over a period of practically two years (Tr. 66).

Before dismissing the libel for lack of prosecution, the court conducted *seven* hearings (including three callings of its dismissal calendar) to ascertain why the matter had not been prosecuted and whether dismissal for lack of prosecution was justified in the premises (Tr. 66). Before dismissing the libel, Judge Goodman insisted that libelant's (appellant's) deposition first be taken so the Court

could review his sworn testimony for possible explanations for the delay in prosecution (Rep. Tr.,* 12, 17, 31).

The libel was then dismissed for lack of prosecution. Thereafter the Court was petitioned to reconsider its order of dismissal. The matter was again fully argued. Additional briefs were filed. Judge Goodman again took the matter under consideration. He again reviewed the deposition (Rep. Tr., p. 31, line 13). The motion for reconsideration was denied.

ISSUES PRESENTED.

Appellant's brief is a hodgepodge of omnibus argument, much of which may have nothing to do with issues before the Court. The required outline of issues presented is absent. Thus, it is difficult to ascertain exactly what appellant is complaining of, except possibly for the fact that his libel has been dismissed.

Appellant's miscellaneous arguments seem to be that in dismissing the libel for lack of prosecution the District Court—(1) Acted in excess of its jurisdiction, (2) Abused its discretion to dismiss the case for want of prosecution, (3) Deprived libelant of procedural due process, (4) Disregarded the equitable doctrine of laches, and (5) Refused to treat libelant as a ward of the admiralty.

*Reporters' Transcript (District Court).

SUMMARY OF ARGUMENT.

It is the contention of appellee that:

a. This appeal should be dismissed because appellant's brief does not contain a statement of the pleadings and facts disclosing the basis upon which it is contended that this Court has jurisdiction to review the District Court's order of dismissal.

b. The District Court had jurisdiction to dismiss the libel for want of prosecution.

c. The District Court had power to dismiss the libel for want of prosecution.

d. The District Court did not abuse its discretion by dismissing the libel for want of prosecution.

e. By dismissing the libel the District Court in no way violated appellant's rights to procedural due process.

f. The doctrine of laches is not involved.

g. The mere assertion that appellant was a ward of the admiralty does not relieve him from the requirement that he be diligent in the prosecution of his cause.

ARGUMENT.

I. APPEAL SHOULD BE DISMISSED BECAUSE APPELLANT HAS FAILED TO SHOW APPELLATE JURISDICTION.

Rule 18(2)(b) of this Court specifically provides that appellant's brief shall contain among other things "(a) statement of the pleadings and facts disclosing the basis upon which it is contended . . . that this Court has jurisdiction to review the judgment, decree or order in question." It is further specifically required that—

“(t)he statement shall refer distinctly (1) to the statutory provisions believed to sustain the jurisdictions, (2) to any treaty of the United States or statute, the validity of which is involved (giving the volume or page where the treaty or statute may be found in the official edition), setting it out verbatim or appropriately summarizing its pertinent provisions; (3) to the pleading necessary to show the existence of the jurisdictions, referring to the pages of the record in which they appear.”

Appellant's brief contains no such statement divulging upon what the appellate jurisdiction of this Court may be grounded.

The appeal should be dismissed for failure to comply with provisions of Rule 18 and specifically for its failure to provide a basis upon which this Court's jurisdiction to review the order of dismissal below is predicated.

II. THE DISTRICT COURT HAD JURISDICTION TO DISMISS LIBEL FOR WANT OF PROSECUTION.

Appellant loosely contends, without troubling to support his contentions by citation of authority, that in dismissing the libel for lack of prosecution the District Court acted without “jurisdiction” (App. Op. Br.,* p. 4, line 7 and p. 6, lines 16-20).

Appellant's contention that the District Court acted without jurisdiction is absolutely baseless. It is suggested that appellant has confused the District Court's “*juris-*

*Appellant's Opening Brief.

diction'' with its *power to act*, or possibly with the proper exercise of its discretion.

This issue requires only the most summary rebuttal here.

In *Article XII* of the Libel (Tr. 4) *libelant himself* asserted that the District Court had personal jurisdiction of the parties and subject matter jurisdiction of the cause. Of this there was never any question. The District Court did have both personal and subject matter jurisdiction. A court with both personal and subject matter jurisdiction cannot by mere abuse of its discretion—as appellant contends—divest itself of jurisdiction.

From their inception the federal courts have possessed general and original jurisdiction of admiralty and maritime matters (Const., Art. III, Sec. 2, Cl. 1). Appellant in this case libelled the Sovereign pursuant to provisions of the "Suits in Admiralty Act" (Act of March 9, 1920, Ch. 95, Par. 2; 41 Stat. 525; 46 U.S.C. 741-752, as amended). That Act confers exclusive original jurisdiction in connection with matters within its purview to the appropriate District Court sitting in admiralty.

A review of all reported cases (civil and admiralty) dismissed for want of prosecution has failed to divulge a single case in which the issue of the District Court's jurisdiction was ever raised. On the other hand, all federal appellate courts which have reviewed similar cases (including this Court on numerous occasions) have proceeded on the basis that there was no question of jurisdiction. *Hicks v. Bekins Moving & Storage Co.* (CA9C-940) 115 Fed. 2d 406; *U. S. v. Pacific Fruit & Produce*

Co. (CA9C-1943) 138 Fed. 2d 367; *Boling v. U. S.* (CA9C-1956) 231 Fed. 2d 926; *Russell v. Cunningham* (CA9C-1956) 233 Fed. 2d 806; *Barger v. Baltimore & O. R. Co.* (CADC-1942) 130 Fed. 2d 401; *Shotkin v. Westinghouse Electric & Mfg. Co.* (CA10C-1948) 169 Fed. 2d 825; *The MERCHANT* (CCSDNY-1857) 4 Blatchf. 105, Fed. Cas. No. 9,436.

The District Court in the instant case clearly had jurisdiction to dismiss the libel for want of prosecution.

III. THE DISTRICT COURT HAD POWER TO DISMISS LIBEL FOR WANT OF PROSECUTION.

Again, it is not clear from appellant's opening brief just what the bases of this appeal are. However, scattered through appellant's miscellany of arguments seems to be the assertion that the District Court had no *power* to dismiss the libel for want of prosecution. This assertion is for the most part unsupported by citation of authority. Such authorities as are provided are substantially unpersuasive and inapplicable.

The power to dismiss for want of prosecution rests in the inherent powers of the District Court and is expressly conferred upon it by Supreme Court Admiralty Rules 38 and 44 and by Rule 14 of its own General Rules.

A. The Court Had Inherent Power to Dismiss for Want of Prosecution.

That the power of dismissal for want of prosecution rests in the inherent powers of the District Court is very clear. In the case of *Hicks v. Bekins Moving & Storage*

Company (115 Fed. 2d 406, at 408), this Court approved and incorporated in its opinion the statement of Mr. George Longsdorf in his *Cyclopedia of Federal Procedure*, Vol. 5, § 1506, p. 80, that:

“(i)t is the settled rule in the federal courts that an action at law may be dismissed for want of prosecution or other delay fatal to the continuance of the action. *Dismissal on such ground is discretionary with the courts, and within their inherent power, independent of the statute or rule.*” (Emphasis added).

The same thought is expressed in 18 C. J. 110, pp. 1191, 1192 and in 17 Am. Jur. § 57, p. 88. Blackstone recognized the right of a court to enter a non-prosequitur in the event of failure of the plaintiff to prosecute his action (Blackstone Comm., Book III, ch. 20, p. 296, ch. 27, p. 451). See also Black on Judgments, 2d Ed., Vol. II, § 702, p. 1057; Freeman on Judgments, 5th Ed., Vol. 1, § 9, p. 16, Vol. 2, § 9, p. 16, Vol. 2, § 751, p. 1579.

The District Court for the District of Colorado has a rule similar to Rule 14 of the District in this case providing for dismissal for want of prosecution. It entered an order of dismissal pursuant to the rule. An appeal followed, and the Circuit Court of Appeals for the Eighth Circuit, in *Colorado Eastern Ry. Co. v. Union Pac. Ry. Co.*, 94 Fed. 312, at 313, said:

“This is a very proper rule, but in the absence of such a rule, every court has the power to dismiss a cause for want of prosecution.”

In addition to its expression of opinion in the *Hicks* case, *supra*, the Court of Appeals for the Ninth Circuit has

often recognized the inherent powers of the District Court to dismiss for want of prosecution.

U. S. v. Pacific Fruit & Produce Co., supra.

Boling v. U. S., supra.

Russell v. Cunningham, supra.

In the *Boling* case this Court recently stated (231 Fed. 2d 926, at 927) :

“The power of the trial court to dismiss a cause where the matter has become stale by virtue of inaction by plaintiff is inherent and has been crystallized by rule.”

Admittedly, all authority cited heretofore derives from matters which have arisen in the trial courts' *civil*, as distinguished from *admiralty* dockets. It is submitted that, even absent express rule, the District Court, sitting in admiralty as it was in the instant case, has the same inherent power to dismiss a libel for want of prosecution. No logical distinction can be made in this regard between a court sitting in its admiralty, instead of its civil capacity.

Moreover, that the Court sitting in admiralty has inherent powers to dismiss a libel for lack of prosecution appears established from dictum in *The MERCHANT, supra*.

The District Court in the instant case had *inherent* power to dismiss the libel for non-prosecution.

B. Supreme Court Admiralty and Local General Rules Invest the District Court With Power to Dismiss for Want of Prosecution.

In his opening brief appellant chose to disregard altogether the District Court's *inherent* powers to dismiss the

libel for want of prosecution. The Court need not look beyond the District Court's inherent powers to dismiss. Nevertheless, the Supreme Court Admiralty and local General Rules invest the District Court with additional, if unnecessary, express power to dismiss the libel for want of prosecution.

1. The District Court Had Power to Dismiss the Libel Pursuant to Provisions of Local General Rule 14.

Congress has delegated to the Supreme Court full power to prescribe general rules for the admiralty practice (Act of June 25, 1948, c. 646; 62 Stat. 961, amended May 24, 1949, c. 139, § 104, 63 Stat. 104; 28 U.S.C. 2073).

Within its admiralty rule-making power the Supreme Court has in turn delegated to the District Courts the power to regulate their own practice (S. Ct. Adm. Rule 44).

“In Suits in Admiralty in all cases not provided for by these rules or by statute, the District Courts are to regulate their practice in such a manner as they deem most expedient for the due administration of justice, provided the same are not inconsistent with these rules.”

The District Court for the Northern District of California has promulgated its own General Rules of practice with a preamble providing that:

“These (general) rules supplement the Federal Rules of Civil and Criminal Procedure, and *are applicable in all proceedings when not inconsistent with any Bankruptcy or Admiralty Rule.*” (Emphasis added).

Rule 14 of the District Court's General Rules instituted the so-called "dismissal calendar" for dilatory litigation in which good cause for lack of prosecution cannot be shown.

"At a time fixed by the Court at least every six months, the Clerk in open Court, under the supervision of the Master Calendar Judge, shall call all civil actions pending in which no steps have been taken for six months.

"Notice of the calling shall be mailed to all attorneys of record. If none of the parties nor their attorneys appear, or if good cause for the lack of prosecution is not shown, the Court may dismiss the action."

The grossly dilatory prosecution of appellant's case first came to the Court's attention on two callings of its dismissal calendar (Rep. Tr. pp. 2-3) pursuant to provisions of local General Rule 14, *supra*. On February 7, 1957, appellee formally asked the Court to dismiss the libel for lack of prosecution (Tr. 66). Thereafter, on February 11, 1957, Judge Goodman *on his own motion* continued the matter, setting it down for hearing on the next following (its third) dismissal calendar. Judge Goodman asked appellee to take appellant's long-denied deposition in the interim so the Court might ascertain whether appellant had any excuse for failure to prosecute.

"The Court. You make arrangements for the deposition, file an answering affidavit, and I will continue this Motion for further hearing until the Dismissal Calendar." (Rep. Tr., p. 12, lines 11-13).

Therefore, on March 8, 1957, when the case appeared on the Court's regular admiralty dismissal calendar it was

called by virtue of Judge Goodman's order of February 11, 1957. Subsequently, the libel was dismissed for lack of prosecution.

With respect to the Court's exercise of its powers to dismiss under local General Rule 14 appellant's objections seem to be (1) that when the case was called on the dismissal calendar on March 8, 1957, it was not there on *the Court's* motion, (2) that local General Rule 14 applies to civil causes of non-admiralty concern only, and (3) that appellant's "last ditch" flurry of interest in his case put the libel beyond the ambit of Rule 14. There is no basis for any of these contentions.

Appellant's contention (Ap. Op. Br., p. 5, lines 19-26) that this case appeared on the Court's dismissal calendar or March 8, 1957 upon *appellee's* motion is utterly unfounded. The case appeared and was dismissed on the dismissal calendar by virtue of Judge Goodman's order (made in open court) on February 11, 1957 (see transcript excerpt, *supra*).

Appellant's contention (Ap. Op. Br., p. 3, lines 17-24) that local General Rule 14 applies only to civil actions of non-admiralty concern is baldly erroneous. The preamble to the local General Rules expressly provides that they "are applicable *in all proceedings* when not inconsistent with any Bankruptcy or Admiralty Rule" (emphasis added). Furthermore, appellant appears to be under the misapprehension that the local General Rules are the Federal Rules of Civil Procedure (Ap. Op. Br., p. 3, lines 18-24). They are not. They are merely local rules promulgated to regulate practice in the local District Court. Ap-

pellant's reference to Rule 81 of the Federal Rules of Civil Procedure has no more application to this matter than a citation to the Ten Commandments would have; appellant's citations of the *Theodorakis* and *Papanikolsow* cases are as far afield as would be a citation to *Shelly's Case* or to the *Dred Scott* decision (Ap. Op. Br., p. 3, lines 18-24).

After appellee had already asked the Court to dismiss the libel for lack of prosecution—and even after Judge Goodman had formally ordered the case called on the March 8th dismissal calendar—appellant filed a motion to set the cause for trial (Tr. 33; Rep. Tr., pp. 13-15). Appellant states that this “last ditch” flurry of apparent interest put the case beyond the ambit of Rule 14. (Ap. Op. Br., p. 3, lines 24-25 and p. 4, lines 1-8.)

It escapes appellee how appellant can seriously contend that “the record discloses that steps were taken by Libellant Appellant (*sic*) within the said six months” next proceeding the case's being placed on the dismissal calendar for the third time. The case was already on the dismissal calendar (February 11, 1957) before appellant bestirred himself to evince some indication of interest by moving the case to be set for trial (February 25, 1957).

The Court of Appeals for the Ninth Circuit has repeatedly observed in this type of case that subsequent diligence is no excuse for past negligence. In *Hicks v. Bekins Moving & Storage Co.*, 115 Fed. 2d 406, this Court wrote as follows at page 409:

“Moreover, an order of dismissal may be granted, notwithstanding the plaintiff has been stirred into

action by the impending dismissal, for subsequent diligence is no excuse for past negligence.”

See also *U. S. v. Pacific Fruit & Produce Co.* (CCA9C) 38 Fed. 2d 367, 372; *Holtzoff v. Dodge & Olcott Co.*, 34 App. Div. 353, 119 N.Y.S. 47, 49; *Buck v. Felder* (DC Penn-1912) 208 Fed. 474, 477.

Appellant also apparently contends that under provisions of Supreme Court Admiralty Rule 38 his libel could not or should not have been dismissed. Supreme Court Admiralty Rule 38 clearly applies and could have served as the Court's authority for dismissal of the libel for lack of prosecution. Admiralty Rule 38 reads as follows:

“If, in any admiralty suit, the libelant shall not appear and prosecute his suit, and comply with the orders of the Court, he shall be deemed in default and contumacy; and the Court may, on the application of the respondent or the claimant, pronounce the suit to be deserted, and the same may be dismissed with costs.”

In the terms of Admiralty Rule 38 libelant did not “appear and prosecute his suit” and Judge Goodman *could* have predicated his dismissal upon that Rule as well. However, the question of whether the libel could have been dismissed under Admiralty Rule 38 is probably moot. The dismissal was clearly and unmistakably made under provisions of local General Rule 14 and within the broad general powers conferred upon the trial court by Supreme Court Admiralty Rule 44, as well as under the Court's inherent powers.

There can be no serious question but that in addition to its inherent powers to dismiss for lack of prosecution

the District Court in the instant case had power to dismiss pursuant to provisions of Admiralty Rule 38 and local General Rule 14 as well.

IV. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY DISMISSING THE LIBEL FOR WANT OF PROSECUTION.

A. Unless There Has Been a Gross Abuse of Discretion a Trial Court's Dismissal for Lack of Prosecution Will Not Be Upset.

Federal courts have consistently held that it is within the sound discretion of the trial court to dismiss a complainant's cause of action where the complainant has failed to prosecute his action with reasonable diligence.

Barger v. Baltimore & Ohio Railroad, supra.

Shotkin v. Westinghouse Electric Co., supra.

U. S. v. Pacific Fruit & Produce Co., supra.

Boling v. U. S., supra.

Hicks v. Bekins Moving & Storage Co., supra.

Russell v. Cunningham, supra.

The MERCHANT, supra.

Douglass v. The WASHINGTON (DCPa-1841)
Fed. Cas. No. 4,033.

The Ninth Circuit has determined that not even mere abuse of discretion will suffice to reverse a District Court's order of dismissal for want of prosecution. In one of the leading authorities on this subject, *Hicks v. Bekins Moving & Storage Co.*, 115 Fed. 2d 406, this Court has held (at p. 409):

“ . . . Unless it is made to appear that there has been a gross abuse of discretion on the part of the trial court in dismissing an action for lack of prosecu-

tion, its decision will not be disturbed on appeal.” (Emphasis added).

o the same effect is *Sweeney v. Anderson* (CCA10C-1942) 29 Fed. 2d 756.

Again, the Court of Appeals for the Ninth Circuit in a *per curiam* opinion by Circuit Judges Healy, Lemmon and Lee has stated as follows in *Boling v. U. S.*, 231 Fed. 2d 26, at page 927:

“One of the causes of congestion of the trial dockets is the failure of courts to exercise the authority vested in them thus to dispose of cases which are shaky or unfounded but which are held on the calendar for nuisance value. Since trial judges are hesitant to dismiss such causes of their own motion, for fear of injustice to some litigant, the device of placing cases in which no action has been taken for a considerable time on a docket for dismissal, absent a showing of adequate explanation for the delay, has been used. But even this palliative for the admitted evil has been of little avail, because of the innate hesitancy mentioned above. Because of this fact, *an order of dismissal for failure to prosecute will never be set aside unless there has been an abuse of discretion, and, of course, such a situation is not presumed.*” (Emphasis added).

3. Burden of Proving Gross Abuse of Discretion Rests Upon Appellant.

The burden rests with the appellant to establish that, in dismissing for want of prosecution, the District Court *grossly* abused the discretionary power with which it is inherently endowed. See *Gurst v. San Diego Transit System*, 119 Cal. App. 2d 51.

C. The Record Discloses No Abuse of Discretion in Dismissing

A review of the record and reading of appellant's brief disclose no conduct on the part of the District Court which could in any way be considered a manifest or gross abuse of discretion in dismissing appellant's libel. Nowhere does appellant, by suggestion or inference, contend that the dismissal was a result of arbitrary, fanciful or unreasonable conduct on the part of the District Court. The presence or absence of such conduct is determinative of whether or not there was any abuse of the Court's discretion.

U. S. v. McWilliams (CADC-1947) 163 Fed. 2d 695.

Time elapsing between the date of alleged accident (November 5, 1952) and entry of the Court's final ruling on the dismissal (March 26, 1957) was in excess of four years and four months. Time elapsing between the filing of the libel (May 5, 1954) and entry of the Court's final ruling was approximately two years and nine months. During all that time the only positive, forward-going action taken was that of the Government in answering the libel (July 26, 1955). The time elapsing between the date the Government filed its answer and the Court's order of dismissal was one year and eight months.

The cause was actually called on *three* dismissal calendars over a period of practically two years. In fact, the only dismissal calendars in the last two years upon which the case did *not* appear automatically were two which were avoided by appellant's filing of sham notices for taking depositions (December 20, 1955 and January 22, 1957—Tr. 66). As to the first of these sham notices the record discloses (Tr. 24) that:

“On December 19, 1955 proctor for libelant served upon . . . (the Government’s counsel) a notice for the taking of the deposition of D. G. Volpintesta, which deposition was noticed for December 22, 1955 at the office of libelant’s proctor; in response to the afore-said notice . . . (the Government’s proctor) personally attended at the offices of proctor for libelant at the time and place designated in the notice on December 22, 1955; proctor for libelant was present and asserted ‘that he did not know anything about the matter’; no reporter had been summoned nor was any present; the Volpintesta deposition was not then and has not since been taken.”

It is common knowledge to both Court and practitioner that delinquent cases can sometimes “dodge” the dismissal calendar by counsel’s filing a sham notice or motion, which, after the danger of dismissal has receded, is normally allowed to die unprosecuted in the clerk’s docket.

The record discloses (Tr. 24, 25 and 66) that once again more than a year later another sham deposition notice was filed with the Court and served upon the Government’s counsel.

“On January 23, 1957 . . . (Government counsel) was served by proctor for libelant with notice for the taking of the deposition of William McGurty; the notice provided that the McGurty deposition would proceed at 9:30 A.M. on January 28, 1957 at the office of Libelant’s proctor; . . . shortly after 9:00 o’clock on the morning of January 28, 1957, the secretary for libelant’s proctor telephoned . . . (Government counsel’s) office to advise that the McGurty deposition would not proceed; the deposition did not proceed and

has not since been taken; there has been no further notice for the taking of the deposition.”

The record further discloses (Tr. 27), without denial from libelant, that the Government repeatedly requested the discovery deposition and medical examination of libelant commencing from a date shortly after filing of the libel. The Government's requests were made both by telephone and in writing. The record includes a copy of the Government's formal written request for libelant's deposition (Tr. 39). Libelant ignored that request.

Libelant was not finally made available for deposition until February 19, 1957, almost two weeks *after* the Government's motion for dismissal and a week after the case was placed on its third dismissal calendar. This was more than four years after the date of alleged injury.

Judge Goodman ordered libelant's deposition taken by the Government at such a late date to enable the Court to ascertain from libelant's own testimony whether there was any explanation other than inexcusable neglect for his failure to prosecute (Rep. Tr., 12, 17, 31). In taking libelant's deposition under the Court's order, counsel for the Government sought to develop whether libelant or his proctor *ever* sought to contact each other to prosecute the action or to provide the Government with libelant's deposition. Proctor for libelant refused to let libelant answer. (Dep.,* p. 57, line 15, *et seq.*).

Appellant's testimony (Dep., pp. 6-31), supported by sixteen United States Coast Guard Certificates of Dis-

*Libelant's Deposition taken February 19, 1957.

Charge attached to the deposition, demonstrates that in the four years and four months between appellant's alleged injury and the deposition date he had been at sea for only 23 months and had been ashore working in and around San Francisco for a total of 26 months. Most of the time he has lived in San Francisco. Libelant is not physically disabled. He owns and drives a car and has by his own admission made innumerable trips to and through San Francisco, during any one of which he might have been made available for the taking of his deposition by the Government.

Judge Goodman was acutely aware of the advanced age of the case (Rep. Tr. pp. 8-11). He stated the problem involved clearly:

"The Court. A man assigned on a boat. The next day he claimed he had some injuries. The next year he filed a claim, an administrative claim. In May, 1954 he filed this suit. This is March of 1957. Five years have gone by since this thing happened. In the meantime he has been going to sea. It is really a stale claim." (Rep. Tr., p. 29, lines 7-12.)

"... The Court. ... It is a question of the policy of the law with respect to so-called stale claims. It is the difficulty that those cases present to a Court endeavoring to try to do justice. One man might remember somewhat better than another, but it is a bigger question than that." (Rep. Tr., p. 29, line 22-p. 30, line 1.)

Judge Goodman's fears that the case was "stale" were justified by libelant's own deposition testimony. In at least twelve places libelant was unable to recall material facts pertaining to his alleged injury. He did not recall the size of bulbs he was working on (Dep. p. 33, lines 6-7); the

construction of the railing he was standing on (p. 33, lines 12-14); which end of the vessel's engine room he was working in (p. 34, lines 5-10); which direction he was facing (p. 34, lines 11-14); the number of rails in the hand rail allegedly involved (p. 37, lines 16-19); whether when the accident happened he was standing on the rail or on a pipe somewhere else (p. 38, lines 2-5); the nature of the inspection box he was working on (p. 39, lines 16-20); whether he was working under any of his superior officers that day, and if so, which one or ones (p. 42, lines 11-22); the proportions or construction of the adjacent catwalk (p. 45, lines 11-26); the kind of shoes worn that day (p. 47, lines 14-26). On two occasions libelant admitted the events occurred too long ago for him to remember them.

“A. I am not sure if it worked on hinges or not. I believe that you just—I have done so many of them they are different, but I believe it worked on a hinge. *That is a long time ago, as I say.*” (p. 39, lines 17-20. Emphasis added).

“A. *This is a long time (ago), and I don't remember too clearly, but anyhow . . . etc.,*” (p. 34, lines 14-15. Emphasis added).

Libelant could not even recall if he had ever read or executed an administrative claim as required under provisions of the “Suits in Admiralty Act” (Dep. pp. 58-59) or whether he had verified his own libel (Dep. p. 59).

Against all of this all appellant can say is that the Government asked for and received time from libelant within which to plead. This argument cannot avail against the Court's order of dismissal. In fact, when proctor for libelant complained about time he extended to the Government to answer Judge Goodman remarked:

“May I interrupt you counsel? You were the master of the ship; you didn’t have to stand by and allow the defendant (*sic*) a year and a half to answer. You could have pressed him” (Rep. Tr., p. 21, lines 9-12).

r, as the same idea has been expressed by the Court of appeals for the Ninth Circuit in *U. S. v. Pacific Fruit & Produce Co.*, 138 Fed. 2d 367, at 372:

“The duty rests upon the plaintiff at every stage of the proceeding to use diligence and to expedite his case to a final determination, and unless it is made to appear that there has been a *gross* abuse of discretion on the part of the trial court in dismissing an action for lack of prosecution its decision will not be disturbed on appeal.”

Before dismissing the libel for lack of prosecution, the court conducted *seven* hearings (including three callings of its dismissal calendar) to ascertain why the matter had not been prosecuted and whether dismissal for lack of prosecution was justified in the premises (Tr. 66). Before dismissing the libel, Judge Goodman insisted that libellant’s (appellant’s) deposition first be taken so the Court could review his sworn testimony for possible explanations for the delay in prosecution (Rep. Tr., 12, 17, 31).

The libel was then dismissed for lack of prosecution. Thereafter the Court was petitioned to reconsider its order of dismissal. The matter was again fully argued. Additional briefs were filed. Judge Goodman again took the matter under consideration. He again reviewed the deposition (Rep. Tr., page 31, line 13). The motion for reconsideration was denied.

The argument of appellant that the order now appealed from was entered in the exercise of an abuse of judicial discretion is without merit. A reading of the record of this case, and an examination of appellant's brief, fail to establish *any* abuse, and certainly discloses no gross abuse of discretion on the part of the District Court in dismissing the case. As has been stated in *Hicks v. Bekins*, *supra*, in the absence of a showing of a gross abuse of discretion, an order such as is now before this Court for review is not susceptible to reversal on appeal.

V. BY DISMISSING LIBEL THE DISTRICT COURT IN NO WAY DEPRIVED APPELLANT OF PROCEDURAL DUE PROCESS.

Appellant's opening brief contains the glancing assertion that Judge Goodman's dismissal of the libel for lack of prosecution in some way deprived appellant of "due process of law" (Ap. Op. Br., p. 6, lines 21-23).

Since appellant submits no citation of authority for this argument either, it is left to the Court and to appellee to fill in the elements of the abuse which purportedly deprived appellant of due process. However, if it is appellant's contention that dismissal of his libel violated his rights to *procedural* due process, that argument can be put to sleep summarily.

Without citing unnecessary authority, the Government submits that the recognized requisites of procedural due process are (1) a hearing before an impartial tribunal of competent jurisdiction, (2) due notice of any hearings and (3) the right to appear and be heard on the issues. Since appellant nowhere in the record or in his brief ever

infers that his right to any one of these elements of procedural due process has been infringed—and appellee is certain none has been—it can only be assumed by the court that there was no violation of due process.

In any event, the question of whether a dismissal for want of prosecution deprives a litigant of procedural due process has been clearly answered in several cases, among them *Shotkin v. Westinghouse Electric & Mfg. Co.* (CCA10C) 169 Fed. 2d 825. In that case the facts were far more extreme than in the instant one because appellant there had not even had *notice* of the impending dismissal. The Circuit Court in that case wrote, at page 826:

“The judgment of dismissal is silent in respect to the place at which it was entered and as to whether notice was given to the parties. It is stated in the brief of appellant that the judgment was entered at Topeka, Kansas, without notice and opportunity to be heard; and upon that statement in the brief, it is argued that appellant was denied due process. While ordinarily notice and opportunity to be heard should be given, the dismissal without notice of an action for failure of plaintiff to prosecute with reasonable diligence does not contravene any sustainable concept of due process with which we are familiar.”

It is to be noted that neither notice nor opportunity to be heard were given in the *Shotkin* case, yet no deprivation of appellant's rights to procedural due process was seriously considered. In the instant case there were *seven* duly noticed hearings, at all of which appellant appeared by his proctor. A number of briefs were filed, appellant's deposition was ordered taken for the purpose of ascertaining any possible excuse for non-prosecution, and the

matter was formally reconsidered by the Court after its initial dismissal for want of prosecution.

To contend seriously here that appellant was deprived of procedural due process is altogether uncalled for and unjustified.

VI. THE DOCTRINE OF LACHES IS NOT INVOLVED.

The doctrine of laches is not involved in this matter as appellant asserts it is (Ap. Op. Br., p. 5, line 14-page 6, line 10), although if it were the matter would certainly have been dismissible on the grounds of laches for non-prosecution.

The Government's motion was not grounded upon the doctrine of laches. Nowhere in the various hearings conducted by Judge Goodman and nowhere in the briefs was the doctrine of laches under consideration. The Court's initial order of dismissal is for "lack of prosecution" (Tr. 47), based upon a provision of local General Rule 14.

The issue of laches was not involved in appellant's motion for reconsideration, nor is it germane to Judge Goodman's "Order Denying Motion to Reconsider Order of Dismissal" (Tr. 62).

However, it is clear from the authorities that the mere institution of proceedings does not relieve a party from the duty to prosecute his cause diligently. This is abundantly clear of proceedings in equity (*Berthold-Jennings Lumber Co. v. St. Louis, I. M. & S. Ry. Co.*, 80 Fed. 2d 32, 101 A.L.R. 688, Cert. Den., 56 S.Ct. 591, 297 U.S. 715, 80 L.Ed. 1001).

“*Neglect to prosecute pending suit.* Negligence in the prosecution of a suit after its commencement may bar relief; the mere institution of a suit does not of itself relieve a person from the operation of the rule of laches; if he fails to prosecute his suit diligently the consequences are the same as though no suit had been begun.” (30 C.J.S. §115)

The rule for the Court of Appeals for the Ninth Circuit is also to the effect that the doctrine of laches may be applied against a libellant for non-prosecution of a libel. In the leading authority on this point this Court has stated as follows:

“And ‘the mere institution of a suit does not relieve a person from the operation of the rule of laches, if he fails to prosecute his suit diligently, the consequences are the same as though no suit had been begun,’ 21 C.J. 125; *Johnston v. Standard Mining Co.*, 148 U.S. 360; *Sullivan v. Portland R. Co.*, 94 U.S. 806; *Barber v. Barber*, 121 Va. 740, 94 S.E. 209; *Drees v. Waldron* (8CCA), 212 Fed. 93; *U.S. v. Fletcher* (8CCA), 242 Fed. 818; *Northrup v. Browne* (8CCA), 204 Fed. 224; *Hendryx v. Perkins* (1CCA), 114 Fed. 801; *Gill v. Colton*, 12 F. (2d) 531 (4CCA).”

The KERMIT (CCA9C-1935), 76 Fed. 2d 363, 367, 1935 A.M.C. 571, 579.

This rule has also been clearly enunciated by the Court in the Southern District of California in *The FREDERICKSBURG* (1947 A.M.C. 1729, 1731).

The opinion of the Ninth Circuit in *The KERMIT*, *supra*, is also the leading authority to the effect that in admiralty matters the issue of laches is to be determined

by the District Court whose determination will not be upset absent abuse of discretion.

“ . . . (t)he question of laches is addressed to the sound discretion of the trial judge and his decision will not be disputed on appeal unless it is so clearly wrong as to amount to an abuse of discretion.”

(76 Fed. 2d 363, 367, 1935 A.M.C. 571, 579.)

As carefully outlined for the Court in Section IV (C) above, the record discloses no abuse of the District Court's discretion.

Appellant argues that the Government is benefiting from its own inaction. The Clerk's docket (Tr. 66) unimpeachably demonstrates where the inaction was and on whose part. In addition the Court's attention is called to the reporter's transcript of proceedings conducted before Judge Goodman on August 31, 1956 (Rep. Tr. pp. 3-4) in which the Government clearly indicated to the Court its readiness to proceed to trial in the month of November, 1956, *provided* the Government be accorded the usual pre-trial procedure before that time.

Accordingly, although the appellee believes the doctrine of laches is not actually involved in this matter, a motion made on the basis of that doctrine could and should have resulted in the same result below, a decree of dismissal for lack of prosecution.

VII. FACT APPELLANT WAS A SEAMAN DOES NOT RELIEVE HIM OF DUTY TO PROSECUTE HIS CAUSE DILIGENTLY.

Throughout his opening brief appellant argues that there is something about his having been a seaman which

operates to relieve him of the duty of prosecuting his case with diligence.

"It is not a circumstance that will excuse delay that the libelant is a seaman" (*The VEMA* (DCEDNY-1939) 1939 A.M.C. 458, 461, citing *Marshall v. Int'l Mercantile Marine Co.*, 39 Fed. 2d 551, 1930 A.M.C. 720).

There is certainly nothing in the fact that appellant was formerly a seaman which in this case made it a hardship or inconvenience for him or his proctor to prosecute diligently. The uncontroverted record is quite clear to the contrary. Appellant's own testimony (Dep., pp. 6-31), supported by sixteen United States Coast Guard Certificates of Discharge attached to the deposition, demonstrates that in the four years and four months between appellant's alleged injury and the date of dismissal he had been at sea only 23 months and had been ashore working in and around the San Francisco area for a total of at least 26 months. Most of the time he was physically present in San Francisco. There is absolutely nothing in the record to explain why libelant's having been a seaman at the time he was injured affected his ability to prosecute his suit.

That the seaman is, in appropriate circumstances, a ward of the admiralty has long been the sentiment of the law. It is possible that continued blind invocation of this ancient maxim by seamen's proctors may—under contemporary circumstances—more abuse than honor the original sentiment of the Courts in this respect.

Certainly, appellant can take no solace from the argument that he was formerly a seaman, and thus a ward of

the admiralty, under the circumstances of the instant case.

CONCLUSION.

The record in this case and arguments propounded by appellant fail to disclose in any manner that the District Court abused its inherent judicial power or its power under local General Rule 14 in dismissing the libel in this case.

The brief for appellant fails to disclose the appellate jurisdiction of this Court within the purview of this Court's Rule 18(2)(b).

Appellee, United States of America, respectfully submits that the appeal should be dismissed for the foregoing reasons or in the alternative that the order of Court appealed from should be affirmed.

Dated, San Francisco, California,

August 5, 1957.

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No. 15539.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FORREST SILVA TUCKER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

I.

Jurisdictional Statement.

On November 7, 1956 the appellant was indicted by the Grand Jury for the Southern District of California in one count for a violation of Section 751, Title 18, U. S. C. (Escape from Federal Custody). [Clk. Tr. p. 2.] The case was tried from January 22, 1957 to and including January 25, 1957, the defendant being represented by retained counsel. On the latter date, the jury returned a verdict of Guilty and defendant was sentenced to eighteen months in the custody of the Attorney General, to run consecutively to a twenty-five year sentence being served in the Northern District of California [Clk. Tr. p. 31] and concurrently to all other sentences. [Rep. Tr. pp. 377, 380, 388.]

The United States District Court had jurisdiction of this case under Section 3231 of Title 28, U. S. C.

Notice of Appeal was filed on January 29, 1957. [Clk. Tr. p. 35.] Thereafter, a Motion for an order granting leave to appeal in Forma Pauperis was granted [Clk. Tr. p. 41], the designation of record filed [Clk. Tr. p. 44] and the record on appeal docketed.

II.

The Statute Involved.

The indictment was brought under Section 751 of Title 18, United States Code, which provides in pertinent part as follows:

“Whoever escapes or attempts to escape from the custody of the Attorney General or his authorized representative, or from any institution in which he is confined by direction of the Attorney General, or from any custody under or by virtue of any process issued under the laws of the United States by any court, judge or commissioner, or from the custody of an officer or employee of the United States pursuant to lawful arrest, shall, if the custody or confinement is by virtue of an arrest on a charge of felony, or conviction of any offense, be fined not more than \$5,000 or imprisoned not more than five years, or both; or if the custody or confinement is for extradition or by virtue of an arrest or charge of or for a misdemeanor, and prior to conviction, be fined not more than \$1,000 or imprisoned not more than one year, or both. June 25, 1948, c. 645, 62 Stat. 734.”

III.

Statement of the Facts.

In connection with the issues raised by appellant, the following facts were proved at the time of trial, in addition to those cited in the opening Brief.

The United States Marshal's Office for the Southern District of California operates within the United States Department of Justice *under the direction and supervision of the Attorney General*. The United States Marshal assumes custody of *all* federal prisoners committed to the custody of the Attorney General and arranges for their safekeeping and transportation to places of confinement. Alcatraz is a federal penitentiary where such prisoners are committed. However, when brought to Los Angeles, they are confined in the County Jail *under a contract with Los Angeles County*. [Rep. Tr. pp. 14, 15.] This contract provided that "Federal prisoners shall be provided with such medical and dental treatment as may be necessary to conserve their health."

Mr. Robert Ware, the U. S. Marshal for this District, corresponded with the Bureau of Prisons in connection with the execution of the above contract [Rep. Tr. p. 18] because of his duty in assuming custody of federal prisoners [Rep. Tr. pp. 14, 15] and recommended acceptance of the contract for that purpose. [Rep. Tr. p. 20.]

The contract was then executed by the Bureau of Prisons, also a part of the U. S. Department of Justice, with the written approval of U. S. Marshal Ware, and

also adopted by the Board of Supervisors for the County of Los Angeles. [Rep. Tr. pp. 10-12.]

Thereafter, the Sheriff's office which has the duty of supervising the operation of the Jail Division, cared for all federal prisoners pursuant to the authority of this document. [Rep. Tr. pp. 36, 37.]

The Los Angeles County Jail unit at the Los Angeles General Hospital is actually a *place of imprisonment*. [Rep. Tr. pp. 29, 30.] When a prisoner was transferred from the Los Angeles County Jail at the Hall of Justice to the General Hospital, the U. S. Marshal for this District did not require notification because there is such a "lock-up" at the Hospital. The contract has a provision for notification because in some counties there is no such facility at the county hospital. [Rep. Tr. p. 21.]

There is a jail hospital facility at the Los Angeles County Jail in the Hall of Justice [Rep. Tr. p. 44] for minor medical attention. [Rep. Tr. pp. 22, 47.] When a federal prisoner is taken to the General Hospital a substantially higher fee is charged to the Government. [Rep. Tr. pp. 26-28.] This latter fee is paid to the Hospital.

After the jail authorities received a letter from appellant while he was incarcerated in the Los Angeles County Jail at the Hall of Justice, he made several visits to the Jail Hospital there. [Rep. Tr. p. 46.] Finally, upon recommendation of the jail doctor, appellant was referred to the General Hospital for further study in regard to possible prostatitis or ureteral calculus. [Rep. Tr. pp. 48, 49.]

The L. A. County Jail Ward at the General Hospital covers a portion of the 13th floor thereof. It is separated from the rest of the hospital by bars and doors. [Rep. Tr. p. 83.]

Deputy Sheriff William Phillips had charge of "custodial and security" operations at the said jail ward as "Sergeant in charge." [Rep. Tr. pp. 62, 63.] Everyone present in the ward was under his supervision as far as custodial and safety requirements were concerned. [Rep. Tr. p. 65.]

There were three shifts of deputy sheriffs in the jail ward during any twenty-four hour period, two men being on each shift. Sergeant Phillips was the third man on the day shift. [Rep. Tr. p. 63.]

There was an average of 67 prisoners processed through the jail ward each day by the two deputy sheriffs. [Rep. Tr. p. 64.] The prisoners were admitted to and transported from the jail ward through a main gate which was always opened and closed by a deputy. [Rep. Tr. pp. 84, 108.] The normal routine in connection with a prisoner leaving the ward for a clinic was to place handcuffs or leg irons on him. The prisoner never walked to the gate, but was always wheeled or carried on a stretcher. [Rep. Tr. pp. 108, 109.]

The key to the handcuffs was always kept by the deputy. [Rep. Tr. p. 109.]

The jail unit at the Hospital has eighteen wards. There was no X-ray equipment. There are various clinics in the hospital staffed with specialists where prisoner patients *had to be taken* for treatment. [Rep. Tr. p. 65.]

These clinics and specialists are *located in other places* in the General Hospital. [Rep. Tr. pp. 65, 112, 117.]

The normal routine when a prisoner was transported to another facility of the General Hospital out of the jail ward was that he was turned over to an attendant other than the two deputy sheriffs or Sergeant Phillips. These attendants were assigned to the jail ward permanently and *worked under the supervision of Sgt. Phillips.* [Rep. Tr. pp. 67, 68.]

The appellant was received from two deputy sheriffs at the jail ward the day before the escape with no indication of his status or record other than "En route U. S. Marshal." [Rep. Tr. p. 73.] He subsequently told one of the deputys in the ward that he was being held as a "material witness." [Rep. Tr. p. 110.]

On the morning of the 4th of November, 1956, he was carried on a stretcher to the main gate at the jail ward by Attendant Knox. A deputy sheriff *placed handcuffs on his wrists and kept the key.* [Rep. Tr. pp. 108, 109.] It was not customary for a deputy to accompany prisoners to other facilities of the hospital, unless certain information was known to him. [Rep. Tr. pp. 114, 115.]

Attendant Knox had been assigned to the jail ward in the General Hospital for two years and the bulk of his duties consisted of transporting prisoner patients from the jail ward to and from the clinics in the hospital. He averaged from eight to ten such trips per day. [Rep. Tr. pp. 110, 117, 128.] He worked under the instruction of Sgt. Phillips or any of the deputies. [Rep. Tr. p. 118.]

On the morning of the 4th, he was directed to take appellant to the Cystoscopic Clinic. [Rep. Tr. p. 118.] This facility was equipped for examination in connection with certain bladder and kidney ailments. There is no such facility in the jail ward at the hospital. [Rep. Tr.

pp. 120, 121.] Attendant Knox then took the appellant to the main gate so the deputy could handcuff him. [Rep. Tr. pp. 118, 217.]

Deputy Scovel kept the key to the handcuffs which were placed on appellant's wrists, as stated above.

Attendant Knox transported the prisoner on the stretcher down to the fourth floor of the hospital and proceeded to the cystoscopic clinic. As he turned to open the double swinging doors, the events occurred which led to the prisoner's escape from the hospital. [Rep. Tr. pp. 122-128.]

The defendant was still in handcuffs when apprehended near Bakersfield later that day. [Rep. Tr. pp. 194, 195, 217.]

IV.

Argument.

The Government respectfully submits that there is no real issue here as to whether or not the Sheriff of Los Angeles County was an authorized representative of the Attorney General of the United States.

The only question in this case is whether appellant was still in the custody of an authorized representative of the Attorney General of the United States at the time of his escape from the custody of a hospital attendant.

The only reasonable conclusion from the evidence in this case is in the affirmative.

However, since counsel has raised the contention that even the L. A. County Sheriff was not authorized by the Attorney General to have custody of the appellant on the ground there is no evidence to prove the Assistant

Director of the Bureau of Prisons was authorized by the Attorney General to enter into contracts with local agencies pertaining to the care and custody of federal prisoners, we call the Court's attention to the fact that the "Motion for Dismissal" made after the Government's *prima facie* case, did not urge this objection. (We assume that the said motion was treated by the District Court as a Motion for Judgment of Acquittal under Rule 29 of the Federal Rules of Criminal Procedure.) It is apparent that the only basis for the motion was that the defendant had been taken out of the County Jail ward of the County Hospital and was in the custody of an orderly of the Hospital. In fact, a concession by counsel seems to be made at line 20 [Rep. Tr. p. 204] that the Sheriff had authority to handle prisoners for the U. S. Marshal and he goes on to say that it was not a delegable power.

The Government also calls this Court's attention to the fact the motion was not renewed in the case. [Rep. Tr. pp. 249, 344, 345.] In order to preserve any question of the sufficiency of the evidence on appeal the motion has to be renewed. Further, the question as to whether the appellant was in the custody of an authorized representative of the Attorney General in connection with the hospital orderly seems to have been submitted to the jury as a question of fact [Rep. Tr. pp. 355, 356] without objection from appellant [Rep. Tr. p. 367] and, therefore, cannot be raised at this time on appeal.

Assuming, *arguendo*, that this Court will consider the first question raised by the appellant, the evidence shows that he is in error. The Los Angeles County Sheriff was clearly an "authorized representative" of the Attorney General.

The U. S. Marshal has the duty of caring for all federal prisoners and works *under the supervision of the Attorney General*. The contract in question was executed at his instance and because of such responsibilities, as shown by the correspondence in evidence, the contract itself [Exs. 5, 6, 7 and 8], and his testimony as to his duties with respect to Federal Prisoners. He recommended its acceptance in writing and ever since that time officially acted in federal custody matters pursuant thereto.

Section 4002 of Title 18, United States Code, provides in effect that the Director of the Federal Bureau of Prisons may contract with the proper authorities of any political subdivision of any state for the "imprisonment, subsistence, care, and proper employment of all persons held under the authority of any enactment of Congress." This section is recited in the contract itself. Further, Section 4042(2) clearly shows that the Bureau of Prisons in so doing is acting under the direction of the Attorney General.

Thus, this particular document executed by the Bureau of Prisons, which is also a part of the Department of Justice, was authorized by statute. Sections 4002 and 4042(2) show the Bureau of Prisons is the actual contracting agency for all matters pertaining to the care and custody of federal prisoners on behalf of the Attorney General. It is equally clear that the representative designated in the contract to care for federal prisoners was in turn an "authorized representative" of the Attorney General since it was also executed with the written approval of and for the benefit of an official acting under the supervision and direction of the Attorney General. The Marshal placed the official stamp of approval from the Attorney General upon the local agency as his author-

ized representative by negotiating the execution of the contract and approving it in writing on the document itself. He then continued to act pursuant to its terms in connection with the custody and care of federal prisoners.

In connection with the merits of the only issue of any substance here, the Government submits that a liberal construction of the statute should be made. This section was obviously created to protect the public against especially dangerous elements of the population. Confinement in prison for long periods of time, together with the prospect of future incarceration, could well engender a determination to escape and stay at large at all costs. Under such conditions, slight provocation from innocent persons and helpless families could easily precipitate serious injury and even death. An unrealistic and strict construction of the Section could provide a means of avoiding the deterrent of the law by those who would cleverly and carefully calculate opportunities for escape outside a narrow construction of custodial status.

Judge Ernest Tolin stated at the trial of the case [Rep. Tr. p. 31]:

“You had within the question the proposition if a man was not in the very prison ward he was not in the County Jail.

Now, I don't think that is involved in the case. The question here is federal custody, custody of the Attorney General. Men are in the custody of the Attorney General at times within this courtroom, at times within the elevator, and we are inquiring into custody of the Attorney General, rather than quality of the institution in which the custody might be exercised.”

The evidence shows that the Jail ward at the General Hospital is actually not much more than a "lock up." Clearly, prisoners could not be kept overnight in wards with other patients at the hospital. A portion of the thirteenth floor is set aside by bars and doors from the rest of the establishment for this purpose. The only reason the prisoners are there at all is because they need, or appear to require, special medical attention which cannot be supplied by the limited facilities at the downtown jail. Since the hospital is equipped with everything necessary for competent medical attention, the only extra facility needed would be on a custodial basis. Obviously, the jail ward was only such a base of operations from which the prisoners could be transported to the facility which suited a particular ailment.

The evidence shows a reasonable custodial routine has been established at the hospital to facilitate the handling of a large number of prisoner patients every day. Further, the fee paid by the Marshal in these cases is paid to the hospital itself and is substantially larger. It strongly indicates that services will be rendered *by the Hospital* in connection with the treatment and examination of prisoners. One of these extra costs is obviously that of attendants, nurses, clerks and others who must of necessity be assigned to the jail ward by the County Hospital. Can it be said the contract with the County did not contemplate the using of hospital orderlies and attendants to transport prisoner patients to necessary facilities under reasonable precautions. The Marshal knew the jail ward was just a "lock-up."

Technically, the contract is with the County of Los Angeles, not the L. A. County Sheriff, and provided for

the safekeeping, care and subsistence of prisoners. The County is a legal entity and could use, in accordance with the spirit of the contract, any county employee whose services would be reasonably necessary in connection with special medical care. Here attendant Knox was also a county employee, exclusively assigned to the jail ward for the purpose of transporting prisoners. Further, careful precautions were taken to safeguard the prisoner's custody. The fact that he succeeded in achieving his liberty for a short time does not change this fact.

There were only two deputy sheriffs available to process the patients and an average of 67 passed through each day. The normal routine was to receive the prisoner on a stretcher or in a wheelchair before he passed through the bars and to handcuff his wrists. It is important to note that the deputy kept the key to appellant's cuffs. Attendant Knox did not have a key.

Appellant was not turned loose on his own devices, with merely the expectation he would dutifully go to the cystoscopic clinic. It could be said appellant was in the joint custody of both the Deputy Sheriff and Attendant Knox. The Sheriff had not made any move to relinquish his custody and, in fact, took steps to safeguard it, as set forth above. The fact that he had to share this custody with a hospital attendant regularly assigned to the jail ward in shuttling prisoners back and forth to necessary medical facilities does not affect his custodial status.

Even so, the contract itself described the place of detainment as the Los Angeles County Jail, Los Angeles, since the basic purpose of the agreement was confinement. However, necessarily flowing from such an arrangement

were provisions for adequate subsistence and medical care. In fact many considerations were given to the confinement of prisoners, such as visits, mail, publicity, personal property, deaths, marriage, employment and others. Normally, with a few exceptions, only the problem of medical care would involve a substantial undertaking with respect to removal of the prisoner's person from the jail in downtown Los Angeles. The contract recognizes the need for outside hospitalization and specifically names the "Los Angeles County General Hospital." It does not mention the jail ward in the hospital. It is thus clear that the contract itself specifically provides for hospitalization in the general medical facilities of the hospital. As stated above, the contract is with the County of Los Angeles, not specifically the Sheriff, and the "Description of Service" is in part set forth as "Safekeeping, care and subsistence of prisoners * * *." There is nothing in it which indicates that "safe custody" in the hospital meant the actual presence of a deputy sheriff at all times with the patient.

There is actually no provision which even demands that there be a deputy sheriff or a "Jail Ward" in the institution. The requirement is that the prisoners are in "safe custody" and "proper discipline and control" are maintained. Of course, it is good sense to expect that jail facilities would be provided from within the Hospital with, at least, supervising deputy sheriffs in charge. Such was the case here. However, the details of custodial arrangements in case of removal to the Hospital are clearly left within the discretion of the County, as long as the above general requirements are fulfilled.

There are few reported cases to be found which deal with the question of custody on an escape charge; how-

ever, the cases cited below all indicate a willingness on the part of the Courts to liberally construe the language of the various statutes and orders before them. In the early case of *Hicks v. Folks, Sheriff of San Diego County*, 97 Cal. 241, January 21, 1893, the Board of Supervisors for San Diego County passed an order providing for the working of prisoners under the direction of a responsible person. The Sheriff resisted a demand of a person appointed as overseer of such prisoners by the Board for the production of certain prisoners in his custody. The appellant contended that the Sheriff was the only legal and proper custodian of prisoners under the Political Code, insisting that the words of the order "under the direction of some responsible person" did not mean a change of custody. The Supreme Court of the State of California did not sustain the Sheriff's contention and stated in part:

"* * * These statutes do not impose any additional duties upon the Sheriff. If it were intended that prisoners while at labor should be in the immediate custody of the Sheriff, it is reasonable to suppose the statute would have said so. The authority given the Board of Supervisors is broad enough to include the custody of the prisoners while absent from the jail, and indeed the custody by the 'responsible person' under whose direction they are required to labor is essential to their profitable employment. *It does not follow from the fact that they are such officers that the Sheriff or any of his deputies are suitable persons to direct such labor;* * * *

The authority conferred upon the Board of Supervisors 'to provide for the working of prisoners' includes all that is required to prevent escapes, as well as the direction of their labor. Any other construc-

tion would, at the pleasure of the Sheriff, *defeat the operation of the statute*, since the statute neither requires the Sheriff to perform this duty, nor authorizes the Board of Supervisors to compel him to perform it. Their custody as well as direction while at work is confined to some 'responsible person' by contract, and not by arbitrary direction. *The Sheriff might be selected for such purpose*, but could not be required to perform the duty, except as the result of a contract voluntarily made by him."

With respect to the contract in question, Rule No. 1 relating to "responsibility for Prisoners' Custody" provides that "It is the responsibility of the Sheriff, Jailor, or other official responsible for the administration of the institution to keep the prisoners in safe custody and to maintain proper discipline and control." Under this provision the County could select the Sheriff for such purpose either solely or jointly with other persons to exercise custodial care over patient prisoners. The County could also select an agency other than the Sheriff to exercise this responsibility as long as the prisoners were in safe custody" and "proper discipline and control" were maintained under the terms of the contract.

The case of *People v. Hadley*, 88 Cal. App. 2d 734, 99 P. 2d 382 (Nov. 20, 1948), may be of interest to this Court in connection with the question of the custody itself. The prisoner was charged in essence with violation of the California Penal Code in that, while a prisoner committed to the State Prison at Folsom for a term less than life, and while at work outside the prison under the surveillance of prison guards, he escaped. The evidence showed that the prisoner was at a camp in charge of a correctional officer of Folsom Prison out-

side of the Prison itself. The defendant left the camp with the permission of the officer to go fishing. There was one other prison guard at the camp in addition to the above officer, but there was no guard with the prisoner on his fishing trip. At the trial defendant asserted that the surveillance had been only a technical one, though the guards were responsible for the prisoners, and that there was no physical control of the men during the day time while working in the forest. The Court held at page 736:

“It is true that the Camp had but two guards who obviously could not keep their eyes at all time on some fifty inmates; but it does not follow that appellant’s escape is not to be deemed within the statute because he was not so guarded. The language of the section was broad, and, we think, quite sufficient to comprehend the escape of appellant from the forestry camp where he was working. See *People v. Howard*, 120 Cal. App. 45, 51-52 (8 P. 2d 176); *People v. Upton*, 67 Cal. App. 445 (228 P. 50); *People v. Lewis*, 61 Cal. App. 280 (214 P. 1005); *People v. Crider*, 76 Cal. App. 1001, 1004 (24 P. 113).”

See also:

People v. Howard, 120 Cal. App. 45, 8 P. 2d 176 (1932).

In *People v. Priegel*, 272 P. 2d 831 (Dist. Ct. of App. 4th Dist., Cal., July 15, 1954), an Order was made by the Superior Court of San Diego that the prisoner be taken from the County Jail to the San Diego County Hospital for treatment and be “kept” there and upon his recovery “be returned to the custody of the Sheriff of San Diego County.” The defendant argued that the

provision in the Order that he be kept "without guard" controlled over the word "kept" and that he was not in custody during his period at the hospital. He contended that the words "returned to the custody" of the Sheriff made it conclusively appear that the Court had released him upon his own recognizance. The Court stated at page 832:

"The entire Order made by the Court must be considered as a whole, and not merely one phrase therein, in order to determine its meaning and effect. * * * Instead of indicating an intention to release the defendant from custody for a time, the Order clearly discloses an intention to maintain continuous custody, the only change being with respect to the place of custody. * * *

The use of the phrase 'without guard' relieved the Sheriff of the duty of furnishing a deputy to guard the defendant during the period of treatment but in no way affected the duty placed on the hospital authorities to keep him there during that period, and until he was returned to the custody of the Sheriff. The only way they could carry out the Court's Order was to lock the defendant up, and the evidence is that the only facilities they had for keeping a patient locked up was by placing him in the psychopathic ward. This was done, * * *."

In the case of *Giles v. United States*, 157 F. 2d 588 (9th Cir., Oct. 14, 1946), this Honorable Court rejected a contention from the appellant that he could not have been deemed to have attempted to escape from custody because he was not at all times under the observation of one or the other of the prison guards. He had been working on a dock with other inmates of Alcatraz under

the general supervision of prison guards. Judge Heal stated at page 589:

“The argument is without force. *The statutory term ‘custody,’ as applied, certainly, to the situation of appellant, is not so narrow and restricted.* Appellant likens the case to one where the custodian of a prisoner purposely abandons his charge, leaving him free to go his own way. There was no abandonment of custody in this instance. Moreover, *the question of custody was submitted to the jury as one of fact* in an instruction stating that, in order to convict the evidence must show beyond a reasonable doubt that the accused was actually in custody at the beginning of the alleged attempt to escape.”

It is clear that the language above quoted, considering the circumstances present in that case, would be controlling in the instant matter. Further, the question of custody was also submitted here to the jury as one of fact [Rep. Tr. pp. 352-356, 366, 367.]

It is respectfully submitted with respect to the *Giles* case that none of the matters raised by Judge Denmark in his defense would be appropriate in this matter.

Conclusion.

It is respectfully submitted to this Honorable Court that, for the reasons stated above, the Judgment below should be affirmed.

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